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CONTENTS

Cases Reported 1
Subject Matter Titles 15
Subject Matter 17
Cases Judicially Considered 87
Statutes Judicially Considered 117
Statutory Instruments, etc., Judicially Considered 127
European Community Enactments Judically Considered 133
International Conventions Judically Considered 137
Recent Points Index 139
Recent Points 145

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INDEX

CASES REPORTED

ICR 2001–2007

AGCO Ltd v Massey Ferguson Works Pension Trust Ltd [2003] EWCA Civ 1044; [2004] ICR 15, CA; (pet dis) [2004] ICR 736, HL(E)
ALM Medical Services Ltd v Bladon [2002] EWCA Civ 1085; [2002] ICR 1444, CA
Abadeh v British Telecommunications plc [2001] ICR 156, EAT
Abdoulaye v Régie Nationale des Usines Renault SA (Case C-218/98) [2001] ICR 527, ECJ
Abrahamsson v Fogelqvist (Case C-407/98) [2002] ICR 932, ECJ
Addey and Stanhope School (Governing Body of) v Vakante [2003] ICR 290, EAT
Addison (trading as Brayton News) v Ashby [2003] ICR 667, EAT
Ahmed v Governing Body of the University of Oxford [2003] EWCA Civ 1907; [2003] ICR 733, CA
Ahuja v Inghams (Accountants) [2002] EWCA Civ 1292; [2002] ICR 1485, CA
Airbus UK Ltd v Webb [2007] ICR 956,EAT
Ako v Rothschild Asset Management Ltd [2002] EWCA Civ 236; [2002] ICR 899, CA
Alabaster v Barclays Bank plc (formerly Woolwich plc) [2005] EWCA Civ 508; [2005] ICR 1246, CA
Alabaster v Woolwich plc (Case C-147/02) [2005] ICR 695, ECJ
Alamo Group (Europe) Ltd v Tucker [2003] ICR 829, EAT
Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie (Case C-67/96) [2001] ICR 774, ECJ
Alderson v Secretary of State for Trade and Industry [2003] EWCA Civ 1765; [2004] ICR 512, CA
Alexander v Brigden Enterprises Ltd [2006] ICR 1277, EAT
Ali v McDonagh [2002] EWCA Civ 93; [2002] ICR 1026, CA; (pet dis) [2003] ICR 88, HL(E)
Allan Janes LLP v Johal [2006] EWHC 286 (Ch); [2006] ICR 742
Allders Department Stores Ltd, In re [2005] ICR 867
Allders Ltd, In re. *See* Allders Department Stores Ltd, In re
Allders Stores Ltd, In re. *See* Allders Department Stores Ltd, In re
Allen v British Rail Engineering Ltd [2001] EWCA Civ 242; [2001] ICR 942, CA
Allonby v Accrington and Rossendale College [2001] EWCA Civ 529; [2001] ICR 1189, CA
Allonby v Accrington and Rossendale College (Case C-256/01) [2004] ICR 1328, ECJ
Amicus v Beliot Walmsley Ltd. *See* GMB v Amicus
Amwell View School (Chairman and Governors of) v Dogherty [2007] ICR 135, EAT
Anderson v Newham College of Further Education [2002] EWCA Civ 505; [2003] ICR 212, CA
Angel v New Possibilities NHS Trust. *See* Jones v 3M Healthcare Ltd
Anglian Home Improvements Ltd v Kelly [2004] EWCA Civ 90; [2005] ICR 242, CA
Ansar v Lloyds TSB Bank plc [2006] ICR 1565, EAT
Anya v University of Oxford [2001] EWCA Civ 405; [2001] ICR 847, CA
Anyanwu v South Bank Student Union (Commission of Racial Equality intervening) [2001] UKHL 14; [2001] ICR 391, HL(E)
Aon Trust Corpn v KPMG [2005] EWCA Civ 1004; [2006] ICR 18, CA; (pet dis) [2006] ICR 424, HL(E)
Apelogun-Gabriels v Lambeth London Borough Council [2001] EWCA Civ 1853; [2002] ICR 713, CA
Appiah v Governing Body of Bishop Douglass Roman Catholic High School (Note) [2007] EWCA Civ 10; [2007] ICR 897, CA
Arblade, Criminal proceedings against (Cases C-369 and 376/96) [2001] ICR 434, ECJ
Archibald v Fife Council [2004] UKHL 32; [2004] ICR 954, HL(Sc)
Arthur v London Eastern Railway Ltd (trading as One Stansted Express) [2006] EWCA Civ 1358; [2007] ICR 193, CA
Ashton v Chief Constable of West Mercia Constabulary [2001] ICR 67, EAT
Atos Origin IT Services UK Ltd v Haddock [2005] ICR 277, EAT
Attorney General's Reference (No 86 of 2006) [2007] ICR 1047, CA
Attridge Law v Coleman [2007] ICR 654, EAT
Awotona v South Tyneside Healthcare NHS Trust [2005] EWCA Civ 217; [2005] ICR 958, CA
Aziz v Crown Prosecution Service [2006] EWCA Civ 1136; [2007] ICR 153, CA
Azmi v Kirklees Metropolitan Borough Council [2007] ICR 1154, EAT

B v BAA plc [2005] ICR 1530, EAT
BEC Pension Trustee Ltd v Sheppeck [2002] EWHC 101 (Ch); [2002] ICR 1343
BG plc v O'Brien. *See* Transco plc v O'Brien
BUPA Care Homes (BNH) Ltd v Cann. *See* Spillett v Tesco Stores Ltd

BUPA Care Homes (CFC Homes) Ltd v Muscolino [2006] ICR 1329, EAT
Babcock International Ltd v National Grid Co plc. *See* Fairchild v Glenhaven Funeral Services Ltd
Babula v Waltham Forest College [2007] EWCA Civ 174; [2007] ICR 1026, CA
Balamoody v United Kingdom Central Council for Nursing, Midwifery and Health Visiting [2001] EWCA Civ 2097; [2002] ICR 646, CA
Baldwin v Brighton and Hove City Council [2007] ICR 680, EAT
Ballantine v Newalls Insulation Co Ltd [2001] ICR 25, CA
Bamsey v Albon Engineering and Manufacturing plc [2003] ICR 1224, EAT; [2004] EWCA Civ 359; [2004] ICR 1083, CA
Bank of Credit and Commerce International SA v Ali [2001] UKHL 8; [2001] ICR 337, HL(E)
Bank of Credit and Commerce International SA v Ali (No 2) [2002] EWCA Civ 82; [2002] ICR 1258, CA
Banks v Ablex Ltd [2005] EWCA Civ 17; [2005] ICR 819, CA
Banks v Chief Adjudication Officer [2001] UKHL 33; [2001] ICR 877, HL(E)
Bansi v Alpha Flight Services (Note) [2007] ICR 308, EAT
Barber v Somerset County Council (pet all) [2002] ICR 1026; [2004] UKHL 13; [2004] ICR 457, HL(E). *See also* Hatton v Sutherland
Barke v SEETEC Business Technology Centre Ltd [2005] EWCA Civ 578; [2005] ICR 1373, CA
Barker v Corus UK Ltd [2006] UKHL 20; [2006] ICR 809, HL(E)
Barking and Dagenham London Borough Council v Watts [2003] EWHC 263 (Ch); [2003] ICR 1059
Barnes v Leavesley [2001] ICR 38, CA
Barnetson v Framlington Group Ltd [2007] EWCA Civ 502; [2007] ICR 1439, CA
Bartlett v Midlands Electricity plc. *See* Preston v Wolverhampton Healthcare NHS Trust (No 3)
Barton v Investec Henderson Crosthwaite Securities Ltd [2003] ICR 1205, EAT
Basingstoke Press Ltd v Clarke [2007] ICR 1284, EAT
Baumbast v Secretary of State for the Home Department (Case C-413/99) [2003] ICR 1347, ECJ
Bayer AG v Commission of the European Communities (Case T-41/96) [2001] ICR 735, CFI; (Cases C-2/01P and C-3/01P) [2005] ICR 834, ECJ
Baynton v South West Trains Ltd [2005] ICR 1730, EAT
Beaumont v Amicus [2007] ICR 341, EAT
Beckett Investment Management Group Ltd v Hall [2007] EWCA Civ 613; [2007] ICR 1539, CA
Beckmann v Dynamco Whicheloe Macfarlane Ltd (Case C-164/00) [2003] ICR 50, ECJ
Beedell v West Ferry Printers Ltd [2001] EWCA Civ 400; [2001] ICR 962, CA
Bennett v Compass Group UK and Ireland Ltd [2002] EWCA Civ 642; [2002] ICR 1177, CA
Bennett v Southwark London Borough Council [2002] EWCA Civ 223; [2002] ICR 881, CA
Benson v Secretary of State for Trade and Industry [2003] ICR 1082, EAT
Bentwood Bros (Manchester) Ltd v Shepherd [2003] EWCA Civ 380; [2003] ICR 1000, CA
Bernadone v Pall Mall Services Group Ltd [2001] ICR 197, CA
Best v Staffordshire University. *See* Hartman v South Essex Mental Health and Community Care NHS Trust
Birmingham City Council v Mtize. *See* Kwamin v Abbey National plc
Bishop v Baker Refractories Ltd. *See* Hatton v Sutherland
Blundell v Governing Body of St Andrew's Catholic Primary School [2007] ICR 1451, EAT
Bold Transmission Parts Ltd v Taree. *See* Kigass Aero Components Ltd v Brown
Bolton School v Evans [2006] EWCA Civ 1653; [2007] ICR 641, CA
Bond v Hackney Citizens Advice Bureau. *See* Jones v 3M Healthcare Ltd
Bone v Fabcon Projects Ltd [2006] ICR 1421, EAT
Borroughs v Powerhouse Retail Ltd. *See* Preston v Wolverhampton Healthcare NHS Trust (No 3)
Botham v Ministry of Defence. *See* Lawson v Serco Ltd
Bower v Stevens [2004] EWCA Civ 496; [2004] ICR 1582, CA
Bradstock Group Pension Scheme Trustees Ltd v Bradstock Group plc [2002] EWHC 651 (Ch); [2002] ICR 1427
Brentjens' Handelsonderneming BV v Stichting Bedrijfspensioenfonds voor de Handel in Bouwmaterialen (Cases C-115–117/97) [2001] ICR 774, ECJ
British Airways plc v Noble [2006] EWCA Civ 537; [2006] ICR 1227, CA; (pet dis) [2006] ICR 1513, HL(E)
British Nursing Association v Inland Revenue [2002] EWCA Civ 494; [2003] ICR 19, CA
Brock v Minerva Dental Ltd [2007] ICR 917, EAT
Brown v Croydon London Borough Council (Note) [2007] EWCA Civ 32; [2007] ICR 909, CA; (pet dis) [2007] ICR 1175, HL(E)
Brown v TNT Express Worldwide (UK) Ltd [2001] ICR 182, CA
Bull v Nottinghamshire and City of Nottingham Fire and Rescue Authority [2007] EWCA Civ 240; [2007] ICR 1631, CA
Bundesverband der Arzneimittel-Importeure eV v Bayer AG. *See* Bayer AG v Commission of the European Communities (Cases C-2/01P and C-3/01P)
Bunyan v Hereford and Worcester County Council. *See* Preston v Wolverhampton Healthcare NHS Trust (No 3)

Burgess v Plymouth City Council [2005] EWCA Civ 1659; [2006] ICR 579, CA
Burns v Royal Mail Group plc (formerly Consignia plc) [2004] ICR 1103, EAT
Burroughs v Powerhouse Retail Ltd (pet all) [2005] ICR 662, HL(E). *See also* Preston v Wolverhampton Healthcare NHS Trust (No 3)
Butlins Skyline Ltd v Beynon (Note) [2007] ICR 121, EAT
Byrne Bros (Formwork) Ltd v Baird [2002] ICR 667, EAT

CELTEC Ltd v Astley [2002] EWCA Civ 1035; [2002] ICR 1289, CA; (pet all) [2003] ICR 999, HL(E). *See also* North Wales Training and Enterprise Council Ltd (trading as CELTEC Ltd) v Astley
CELTEC Ltd v Astley (Case C-47/03) [2005] ICR 1409, ECJ
Cable & Wireless plc v Muscat [2006] EWCA Civ 220; [2006] ICR 975, CA
Cadman v Health and Safety Executive (Equal Opportunities Commission intervening) (Case C-17/05) [2006] ICR 1623, ECJ
Cafferkey (JJ) & Co Ltd v Byrne. *See* Smith v A J Morrisroes & Sons Ltd
Cairns v Visteon UK Ltd [2007] ICR 616, EAT
Campbell v Frisbee [2002] EWCA Civ 1374; [2003] ICR 141, CA
Canada Life Ltd v Gray [2004] ICR 673, EAT
Canary Wharf Management Ltd v Edebi [2006] ICR 719, EAT
Capital Cranfield Trustees Ltd v Pinsent Curtis [2005] EWCA Civ 860; [2005] ICR 1767, CA
Care First Partnership Ltd v Roffey [2001] ICR 87, CA
Carter v Ahsan [2004] ICR 938, EAT; [2005] EWCA Civ 990; [2005] ICR 1817, CA; (pet all) [2006] ICR 424, HL(E)
Casey v Morane Ltd [2001] ICR 316, CA
Catherall v Michelin Tyres plc [2003] ICR 28, EAT
Caulfield v Hanson Clay Products Ltd (Case C-257/04). *See* Robinson-Steele v RD Retail Services Ltd (Cases C-131 and 257/04)
Cerberus Software Ltd v Rowley [2001] ICR 376, CA; (pet dis) [2001] ICR 1241, HL(E)
Chacón Navas v Eurest Colectividades SA (Case C-13/05) [2007] ICR 1, ECJ
Chamberlin v Emokpae [2004] ICR 1476, EAT; [2005] EWCA Civ 142; [2005] ICR 931, CA
Chaudhary v Royal College of Surgeons [2003] EWCA Civ 645; [2003] ICR 1510, CA; (pet dis) [2004] ICR 736, HL(E)
Chaudhary v Specialist Training Authority. *See* Chaudhary v Royal College of Surgeons
Chaudhary v Specialist Training Authority Appeal Panel (No 2) [2005] EWCA Civ 282; [2005] ICR 1086, CA; (pet dis) [2007] ICR 354, HL(E)
Cheshire and Wirral Partnership NHS Trust v Abbott [2006] EWCA Civ 523; [2006] ICR 1267, CA
Chief Constable of Bedfordshire Police v Liversidge [2002] EWCA Civ 894; [2002] ICR 1135, CA; (pet dis) [2003] ICR 88, HL(E)
Chief Constable of Cumbria v McGlennon [2002] ICR 1156, EAT
Chief Constable of Kent County Constabulary v Baskerville [2003] EWCA Civ 1354; [2003] ICR 1463, CA
Chief Constable of the Merseyside Police v Husain. *See* Yearwood v Comr of Police of the Metropolis
Chief Constable of the West Yorkshire Police v A [2001] ICR 128, EAT
Chief Constable of the West Yorkshire Police v A (No 2) [2002] ICR 552, EAT; [2002] EWCA Civ 1584; [2003] ICR 161, CA; (pet all) [2003] ICR 998; [2004] UKHL 21; [2004] ICR 806, HL(E)
Chief Constable of the West Yorkshire Police v Khan [2001] UKHL 48; [2001] ICR 1065, HL(E)
Chief Constable of the West Yorkshire Police v Vento. *See* Vento v Chief Constable of the West Yorkshire Police
Christie v Department for Constitutional Affairs [2007] ICR 1553, EAT
Clark v Perks (No 2) [2001] EWCA Civ 1228; [2002] ICR 302, CA
Clarke v Frank Staddon Ltd. *See* Marshalls Clay Products Ltd v Caulfield
Clarke v Frank Staddon Ltd (Case C-257/04). *See* Robinson-Steele v RD Retail Services Ltd (Cases C-131 and 257/04)
Clarke v Redcar and Cleveland Borough Council [2006] ICR 897, EAT
Cobley v Forward Technology Industries plc [2003] EWCA Civ 646; [2003] ICR 1050, CA
Cockrill v Wolverhampton Metropolitan Borough Council. *See* Preston v Wolverhampton Healthcare NHS Trust (No 3)
Cole (Stanley) (Wainfleet) Ltd v Sheridan [2003] ICR 297, EAT; [2003] EWCA Civ 1046; [2003] ICR 1449, CA
Colen v Cebrian (UK) Ltd [2003] EWCA Civ 1676; [2004] ICR 568, CA
Coles v Barracks (Secretary of State for the Home Department intervening) [2006] EWCA Civ 1041; [2007] ICR 60,CA
Collino v Telecom Italia SpA (Case C-343/98) [2002] ICR 38, ECJ
Collins v Secretary of State for Work and Pensions [2006] EWCA Civ 376; [2006] ICR 1033, CA
Collins v Secretary of State for Work and Pensions (Case C-138/02) [2005] ICR 37, ECJ
Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland (Case C-484/04) [2007] ICR 592, ECJ

Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland (Case C-127/05) [2007] ICR 1393, ECJ
Commotion Ltd v Rutty [2006] ICR 290, EAT
Comr of Police of the Metropolis v Harley [2001] ICR 927, EAT
Comr of Police of the Metropolis v Hendricks [2002] EWCA Civ 1686; [2003] ICR 530, CA; (pet dis) [2003] ICR 999, HL(E)
Comr of Police of the Metropolis v Miller. *See* Yearwood v Comr of Police of the Metropolis
Connex South Eastern Ltd v Bangs [2005] EWCA Civ 14; [2005] ICR 763, CA; (pet all) [2005] ICR 1161, HL(E). *See also* Kwamin v Abbey National plc
Connolly v Sellers Arenascene Ltd [2001] EWCA Civ 184; [2001] ICR 760, CA
Conseil National d l'Ordre des Architectes v Dreessen (Case C-31/00) [2002] ICR 1227, ECJ
Consignia plc (formerly The Post Office) v Sealy [2002] EWCA Civ 878; [2002] ICR 1193, CA
Cooke v Glenrose Fish Co [2004] ICR 1188, EAT
Coors Brewers Ltd v Adcock [2007] EWCA Civ 19; [2007] ICR 983, CA
Copsey v WBB Devon Clays Ltd [2005] EWCA Civ 932; [2005] ICR 1789, CA; (pet dis) [2006] ICR 205, HL(E)
Cornwall County Council v Prater [2006] EWCA Civ 102; [2006] ICR 731, CA
Corr v IBC Vehicles Ltd [2006] EWCA Civ 331; [2006] ICR 1138, CA
Courage Ltd v Crehan (Case C-453/99) [2002] ICR 457, ECJ
Coutts & Co plc v Cure [2005] ICR 1098, EAT
Coxall v Goodyear Great Britain Ltd [2002] EWCA Civ 1010; [2003] ICR 152, CA
Coxon v Rank Xerox (UK) Ltd [2003] ICR 628, EAT
Cranswick Country Foods plc v Beall [2007] ICR 691, EAT
Crehan v Inntrepreneur Pub Co (CPC) (Office of Fair Trading intervening) [2006] UKHL 38; [2006] ICR 1344, HL(E)
Cressey v E Timm & Son Ltd (Practice Note) [2005] EWCA Civ 763; [2006] ICR 282, CA
Croft v Royal Mail Group plc (formerly Consignia plc) [2003] EWCA Civ 1045; [2003] ICR 1425, CA
Crofts v Cathay Pacific Airways Ltd [2005] EWCA Civ 599; [2005] ICR 1436, CA; (pet all) [2005] ICR 1749, HL(E)
Crofts v Veta Ltd. *See* Lawson v Serco Ltd
Croke v Hydro Aluminium Worcester Ltd [2007] ICR 1303, EAT
Crosby-Clarke v Air Foyle Ltd. *See* Rossiter v Pendragon plc
Cross v British Airways plc [2006] EWCA Civ 549; [2006] ICR 1239, CA
Crossley v Faithful & Gould Holdings Ltd [2004] EWCA Civ 293; [2004] ICR 1615, CA
Cruickshank v VAW Motorcast Ltd [2002] ICR 729, EAT
Curr v Marks & Spencer plc [2002] EWCA Civ 1852; [2003] ICR 443, CA
Customs and Excise Comrs v Elm Milk Ltd [2006] EWCA Civ 164; [2006] ICR 880, CA

D & H Travel Ltd v Foster [2006] ICR 1537, EAT
Dacas v Brook Street Bureau (UK) Ltd [2004] EWCA Civ 217; [2004] ICR 1437, CA
Darnton v University of Surrey [2003] ICR 615, EAT
Dave v Robinska [2003] ICR 1248, EAT
Daw v Intel Corpn (UK) Ltd [2007] EWCA Civ 70; [2007] ICR 1318, CA
Dawson v Cherry Tree Machine Co Ltd [2001] EWCA Civ 100; [2001] ICR 1223, CA
De Bergolis v Norinchukin International plc. *See* Hanly v Norinchukin International plc
De Cuyper v Office national de l'emploi (Case C-406/04) [2007] ICR 317, ECJ
de Haney v Brent MIND [2003] EWCA Civ 1637; [2004] ICR 348, CA
Degnan v Redcar and Cleveland Borough Council. *See* Newcastle upon Tyne City Council v Allan
Department for Environment Food and Rural Affairs v Robertson [2004] ICR 1289, EAT; [2005] EWCA Civ 138; [2005] ICR 750, CA; (pet dis) [2005] ICR 1749, HL(E)
Department of Health v Chaudhary. *See* Chaudhary v Royal College of Surgeons
Derby Specialist Fabrication Ltd v Burton [2001] ICR 833, EAT
Derbyshire v St Helens Metropolitan Borough Council [2005] EWCA Civ 977; [2006] ICR 90, CA; sub nom Derbyshire v St Helens Metropolitan Borough Council (Equal Opportunities Commission intervening) [2007] UKHL 16; [2007] ICR 841, HL(E)
Derin v Landkreis Darmstadt-Dieburg (Case C-325/05) [2007] ICR 1706, ECJ
D'Hoop v Office national de l'emploi (Case C-224/98) [2004] ICR 137, ECJ
Dickie v Cathay Pacific Airways Ltd [2004] ICR 1733, EAT. *See also* Crofts v Cathay Pacific Airways Ltd
Doherty v Rugby Joinery (UK) Ltd [2004] EWCA Civ 147; [2004] ICR 1272, CA
Dowling v M E Ilic Haulage [2004] ICR 1176, EAT
Downey v Charles Evans Shopfitters Ltd. *See* Rothwell v Chemical & Insulating Co Ltd
D'Souza v Lambeth London Borough Council [2003] UKHL 33; [2003] ICR 868, HL(E)
Dudley Bower Building Services Ltd v Lowe [2003] ICR 843, EAT
Duggins v Tipper. *See* Krasner v McMath
Dugmore v Swansea NHS Trust [2002] EWCA Civ 1689; [2003] ICR 574, CA
Dunham v Ashford Windows Ltd [2005] ICR 1584, EAT

Dunnachie v Kingston upon Hull City Council [2003] ICR 1294, EAT; [2004] EWCA Civ 84; [2004] ICR 481, CA; [2004] UKHL 36; [2004] ICR 1052, HL(E)
Duthie v Bath and North East Somerset Council [2003] ICR 1405, EAT
Dyson v Leeds City Council. *See* Fairchild v Glenhaven Funeral Services Ltd

Eastbourne Borough Council v Foster [2001] EWCA Civ 1091; [2002] ICR 234, CA
Eastwood v Magnox Electric plc (Note) [2002] EWCA Civ 463; [2003] ICR 520, CA; [2004] UKHL 35; [2004] ICR 1064, HL(E)
Edmund Nuttall Ltd v Butterfield [2006] ICR 77, EAT
Edwards v Mid-Suffolk District Council [2001] ICR 616, EAT
Ekpe v Comr of Police of the Metropolis [2001] ICR 1084, EAT
Ellis v Bristol City Council [2007] EWCA Civ 685; [2007] ICR 1614, CA
Ellis v Harris. *See* Krasner v McMath
Essa v Laing Ltd [2003] ICR 1110, EAT; [2004] EWCA Civ 2; [2004] ICR 746, CA
Evans v The Malley Organisation Ltd (trading as First Business Support) [2002] EWCA Civ 1834; [2003] ICR 432, CA
Expro Gulf Ltd v Birnie. *See* Dickie v Cathay Pacific Airways Ltd
Ezsias v North Glamorgan NHS Trust [2007] EWCA Civ 330; [2007] ICR 1126, CA

FJL Realisations Ltd, In re [2001] ICR 424, CA
Facey v Midas Retail Security Ltd [2001] ICR 287, EAT
Fadipe v Reed Nursing Personnel (Note) [2001] EWCA Civ 1885; [2005] ICR 1760, CA
Fairchild v Glenhaven Funeral Services Ltd [2001] EWCA Civ 1881; [2002] ICR 412, CA; [2002] UKHL 22; [2002] ICR 798, HL(E)
Fairhurst Ward Abbotts Ltd v Botes Building Ltd [2004] EWCA Civ 83; [2004] ICR 919, CA; (pet dis) [2005] ICR 212, HL(E)
Farrell Matthews & Weir v Hansen [2005] ICR 509, EAT
Fatnani v General Medical Council. *See* Raschid v General Medical Council
Federatie Nederlandse Vakbeweging v Netherlands State (Case C-124/05) [2006] ICR 962, ECJ
Fitzgerald v University of Kent at Canterbury [2004] EWCA Civ 143; [2004] ICR 737, CA
Fletcher v Midland Bank plc (No 2). *See* Preston v Wolverhampton Healthcare NHS Trust (No 2)
Fletcher v Midland Bank plc (No 3). *See* Preston v Wolverhampton Healthcare NHS Trust (No 3)
Fletcher v NHS Pensions Agency [2005] ICR 1458, EAT
Flett v Matheson [2005] ICR 1134, EAT; [2006] EWCA Civ 53; [2006] ICR 673, CA
Forshaw v Archcraft Ltd (Note) [2006] ICR 70, EAT
Forster v Cartwright Black [2004] ICR 1728, EAT
Fox v Spousal (Midlands) Ltd. *See* Fairchild v Glenhaven Funeral Services Ltd
Franks v Reuters Ltd [2003] EWCA Civ 417; [2003] ICR 1166, CA
Fraser v HLMAD Ltd [2006] EWCA Civ 1395; [2006] ICR 1395, CA
Friend v Civil Aviation Authority [2001] EWCA Civ 1204; [2002] ICR 525, CA
Fytche v Wincanton Logistics plc [2003] EWCA Civ 874; [2003] ICR 1582, CA; [2004] UKHL 31; [2004] ICR 975, HL(E)

GAB Robins (UK) Ltd v Triggs [2007] ICR 1424, EAT
GMB v Amicus [2003] ICR 1396, EAT
Gallagher v Alpha Catering Services Ltd (trading as Alpha Flight Services) [2004] ICR 1489, EAT; [2004] EWCA Civ 1559; [2005] ICR 673, CA
Garrett (J P) Electrical Ltd v Cotton. *See* Woodward v Abbey National plc (No 2)
Gdynia America Shipping Lines (London) Ltd v Chelminski [2004] EWCA Civ 871; [2004] ICR 1523, CA
Getmapping plc v Ordnance Survey [2002] EWHC 1089 (Ch); [2003] ICR 1
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R (Metropolitan Police Authority) v Beck. *See* R (McGinley) v Schilling

R (NASUWT) v Secretary of State for Trade and Industry (Christian Action Research Education intervening). *See* R (Amicus—MSF Section) v Secretary of State for Trade and Industry (Christian Action Research Education intervening)
R (National Association of Teachers in Further and Higher Education) v Secretary of State for Trade and Industry (Christian Action Research Education intervening). *See* R (Amicus—MSF Section) v Secretary of State for Trade and Industry (Christian Action Research Education intervening)
R (National Union of Journalists) v Central Arbitration Committee [2004] EWHC 2612 (Admin); [2005] ICR 493; sub nom R (National Union of Journalists) v Central Arbitration Committee (Secretary of State for Trade and Industry intervening) [2005] EWCA Civ 1309; [2006] ICR 1, CA
R (National Union of Rail, Maritime and Transport Workers) v Secretary of State for Trade and Industry (Christian Action Research Education intervening). *See* R (Amicus—MSF Section) v Secretary of State for Trade and Industry (Christian Action Research Education intervening)
R (National Union of Teachers) v Secretary of State for Trade and Industry (Christian Action Research Education intervening). *See* R (Amicus—MSF Section) v Secretary of State for Trade and Industry (Christian Action Research Education intervening)
R (Nicholds) v Security Industry Authority [2006] EWHC 1792 (Admin); [2007] ICR 1076
R (Northumbria Police Authority) v Broome [2005] EWHC 2644 (Admin); [2006] ICR 555
R (Ozturk) v Secretary of State for the Home Department [2005] EWHC 1433 (Admin); [2006] ICR 178; [2006] EWCA 541; [2006] ICR 1314, CA
R (Payir) v Secretary of State for the Home Department [2005] EWHC 1426 (Admin); [2006] ICR 188; [2006] EWCA 541; [2006] ICR 1314, CA
R (Public and Commercial Services Union) v Secretary of State for Trade and Industry (Christian Action Research Education intervening). *See* R (Amicus—MSF Section) v Secretary of State for Trade and Industry (Christian Action Research Education intervening)
R (Ridley) v St Thomas More Roman Catholic High School. *See* R (Verner) v Derby City Council
R (Sheppard) v Norfolk County Council. *See* R (Verner) v Derby City Council
R (Steele) v Birmingham City Council [2006] EWCA Civ 1824; [2006] ICR 869, CA
R (Stunt) v Mallett [2001] EWCA Civ 265; [2001] ICR 989, CA
R (Sussex Police Authority) v Beck (Note) [2003] EWHC 1361 (Admin); [2006] ICR 570
R (Thorpe) v Security Industry Authority. *See* R (Nicholds) v Security Industry Authority
R (Tucker) v Director General of the National Crime Squad [2003] EWCA Civ 57; [2003] ICR 599, CA
R (Ultraframe (UK) Ltd) v Central Arbitration Committee [2005] EWCA Civ 560; [2005] ICR 1194, CA
R (Unison) v Secretary of State for Trade and Industry (Christian Action Research Education intervening). *See* R (Amicus—MSF Section) v Secretary of State for Trade and Industry (Christian Action Research Education intervening)
R (Verner) v Derby City Council [2003] EWHC 2708 (Admin); [2004] ICR 535
R (Wandsworth London Borough Council) v South Western Magistrates' Court [2003] EWHC 1158 (Admin); [2003] ICR 1287, DC
RCO Support Services Ltd v UNISON [2002] EWCA Civ 464; [2002] ICR 751, CA; (pet all) [2003] ICR 89, HL(E)
Rabahallah v British Telecommunications plc [2005] ICR 440, EAT
Rai v Somerfield Stores Ltd [2004] ICR 656, EAT
Railtrack plc v Smallwood [2001] EWHC Admin 78; [2001] ICR 714
Ramdoolar v Bycity Ltd [2005] ICR 368, EAT
Raschid v General Medical Council [2007] EWCA Civ 46; [2007] ICR 811, CA
Redfearn v Serco Ltd (trading as West Yorkshire Transport Service) [2006] EWCA Civ 659; [2006] ICR 1367, CA
Redrow Homes (Yorkshire) Ltd v Wright [2004] EWCA Civ 469; [2004] ICR 1126, CA
Relaxion Group plc v Rhys-Harper. *See* Rhys-Harper v Relaxion Group plc
Revenue and Customs Comrs v Leisure Employment Services Ltd [2006] ICR 1094, EAT; [2007] EWCA Civ 92; [2007] ICR 1056, CA
Rhys-Harper v Relaxion Group plc [2001] EWCA Civ 634; [2001] ICR 1176, CA; (pet all) [2002] ICR 486; [2003] UKHL 33; [2003] ICR 867, HL(E)
Richards v Secretary of State for Work and Pensions (Case C-423/04) [2006] ICR 1181, ECJ
Rice v Secretary of State for Trade and Industry [2007] EWCA Civ 289; [2007] ICR 1469, CA
Richardson v U Mole Ltd [2005] ICR 1664, EAT
Robb v Salamis (M & I) Ltd [2006] UKHL 56; [2007] ICR 175, HL(Sc)
Roberts v Redrow Homes (North West) Ltd. *See* Redrow Homes (Yorkshire) Ltd v Wright
Roberts v Skelmersdale College [2003] EWCA Civ 954; [2003] ICR 1127, CA
Roberts v West Coast Trains Ltd [2004] EWCA Civ 900; [2005] ICR 254, CA
Robins v Secretary of State for Work and Pensions (Case C-278/05) [2007] ICR 779, ECJ
Robinson-Steele v RD Retail Services Ltd (Cases C-131 and 257/04) [2006] ICR 932, ECJ
Roquette Frères SA v Directeur général de la concurrence, de la consommation et de la répression des fraudes (Commission of the European Communities, Third party) (Case C-94/00) [2004] ICR 66, ECJ
Rose v Dodd [2005] EWCA Civ 957; [2005] ICR 1776, CA
Rossiter v Pendragon plc [2001] ICR 1265, EAT; [2002] EWCA Civ 745; [2002] ICR 1063, CA

Rothwell v Chemical & Insulating Co Ltd [2006] EWCA Civ 27; [2006] ICR 1458, CA; [2007] UKHL 39; [2007] ICR 1745, HL(E)
Rowden v Dutton Gregory [2002] ICR 971, EAT
Royal and Sun Alliance Life and Pensions Ltd v Pensions Ombudsman. *See* Moore's (Wallisdown) Ltd v Pensions Ombudsman
Royle v Greater Manchester Police Authority [2007] ICR 281, EAT
Rugamer v Sony Music Entertainment UK Ltd [2002] ICR 381, EAT. *See also* McNicol v Balfour Beatty Rail Maintenance Ltd
Rydqvist v Secretary of State for Work and Pensions [2002] EWCA Civ 947; [2002] ICR 1383, CA

SSAFA Forces Help v McClymont. *See* Dickie v Cathay Pacific Airways Ltd
Saeed v Royal Wolverhampton Hospitals NHS Trust [2001] ICR 903, CA
Saggar v Ministry of Defence [2004] ICR 1708, EAT; [2005] EWCA Civ 413; [2005] ICR 1073, CA
Sainsbury (J) plc v Hitt [2002] EWCA Civ 1588; [2003] ICR 111, CA
St Helens Metropolitan Borough Council v Derbyshire (pet all) [2006] ICR 424, HL(E). *See also* Derbyshire v St Helens Metropolitan Borough Council
Salinas v Bear Stearns International Holdings Inc [2005] ICR 1117, EAT
Sánchez Hidalgo v Asociación de Servicios Aser (Case C-173/96) (Note) [2002] ICR 73, ECJ
Sanderson v Exel Management Services Ltd [2006] ICR 1337, EAT
Sandhu v Jan de Rijk Transport Ltd [2007] EWCA Civ 430; [2007] ICR 1137, CA
Scanfuture (UK) Ltd v Secretary of State for Trade and Industry [2001] ICR 1096, EAT
Scotford v SmithKline Beecham [2002] ICR 264, EAT
Scott v Inland Revenue Comrs [2004] EWCA Civ 400; [2004] ICR 1410, CA
Scotts Co (UK) Ltd, The v Budd [2004] ICR 299, EAT
Scott-Davies v Redgate Medical Services [2007] ICR 348, EAT
Seafield Holdings Ltd (trading as Seafield Logistics) v Drewett [2006] ICR 1413, EAT
Secretary of State for Education and Skills v Bailey [2003] EWHC 1873 (Ch); [2004] ICR 181
Secretary of State for Education and Skills v Mairs [2005] EWHC 996 (Admin); [2005] ICR 1714
Secretary of State for Health v Tyrell. *See* Preston v Wolverhampton Healthcare NHS Trust (No 3)
Secretary of State for Scotland v Mann [2001] ICR 1005, EAT(Sc)
Secretary of State for Trade and Industry v Bentley. *See* Secretary of State for Trade and Industry v Rutherford (No 2)
Secretary of State for Trade and Industry v Rutherford (No 2) [2005] ICR 119, EAT; [2004] EWCA Civ 1186; [2005] ICR 119, CA; (pet all) [2005] ICR 749 [2006] UKHL 19; [2006] ICR 785, HL(E)
Seeboard Retail plc v Croucher. *See* Preston v Wolverhampton Healthcare NHS Trust (No 3)
Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] UKHL 11; [2003] ICR 337, HL(NI)
Sharp v Caledonia Group Services Ltd [2006] ICR 218, EAT
Shawkat v Nottingham City Hospital NHS Trust (No 2) [2001] EWCA Civ 954; [2002] ICR 7, CA
Shekar v Satyam Computer Services Ltd [2005] ICR 737, Employment Tribunal
Shergold v Fieldway Medical Centre [2006] ICR 304, EAT
Sian v Abbey National plc [2004] ICR 55, EAT
Sidhu v Aerospace Composite Technology Ltd [2001] ICR 167, CA
Simmons v British Steel plc [2004] UKHL 20; [2004] ICR 585, HL(Sc)
Sindicato de Médicos de Asistencia Pública (SIMAP) v Consellería de Sanidad y Consumo de la Generalidad Valenciana (Case C-303/98) [2001] ICR 1116, ECJ
Skidmore v Dartford & Gravesham NHS Trust [2001] ICR 911, EAT; [2002] EWCA Civ 18; [2002] ICR 403, CA; (pet all) [2002] ICR 798; [2003] UKHL 27; [2003] ICR 721, HL(E)
Smith v A J Morrisroes & Sons Ltd [2005] ICR 596, EAT
Smith v Churchill Stairlifts plc [2005] EWCA Civ 1220; [2006] ICR 524, CA
Sodexho Ltd v Gibbons [2005] ICR 1647, EAT
Software 2000 Ltd v Andrews [2007] ICR 825, EAT
South Ayrshire Council v Morton [2002] ICR 956, Ct of Sess
South East Sheffield Citizens Advice Bureau v Grayson [2004] ICR 1138, EAT
Southwark London Borough Council v Afolabi [2003] EWCA Civ 15; [2003] ICR 800, CA
Southwark London Borough Council v Bartholomew [2004] ICR 358, EAT
Southwark London Borough Council v Jiminez [2003] EWCA Civ 502; [2003] ICR 1176, CA
Southwark London Borough Council v Whillier [2001] ICR 142, EAT; [2001] EWCA Civ 808; [2001] ICR 1016, CA
South Central Trains Ltd v Rodway [2005] ICR 75, EAT
South East Essex College v Abegaze [2006] ICR 468, EAT
South Tyneside Metropolitan Borough Council v Anderson [2007] EWCA Civ 654; [2007] ICR 1581, CA
Spence v British Railways Board [2001] ICR 232, EAT
Spicer v Government of Spain [2004] EWCA Civ 1046; [2005] ICR 213, CA
Spillett v Tesco Stores Ltd [2006] ICR 643, EAT
Stansbury v Datapulse plc [2003] EWCA Civ 1951; [2004] ICR 523, CA
Stephenson v Delphi Diesel Systems Ltd [2003] ICR 471, EAT

Steria Ltd v Hutchison [2006] EWCA Civ 1551; [2007] ICR 445, CA
Stonham Housing Association Ltd v Dawson. *See* Dunnachie v Kingston upon Hull City Council
Street v Derbyshire Unemployed Workers' Centre [2004] ICR 213, EAT; [2004] EWCA Civ 97; [2005] ICR 97, CA
Surrey Police Authority v Beckett [2001] EWCA Civ 1253; [2002] ICR 257, CA
Susie Radin Ltd v GMB [2004] EWCA Civ 180; [2004] ICR 893, CA
Sutton v Potting Construction Ltd. *See* Marshalls Clay Products Ltd v Caulfield
Sutton v The Ranch Ltd [2006] ICR 1170, EAT
Swift v Chief Constable of Wiltshire Constabulary [2004] ICR 909, EAT
Synaptek Ltd v Young [2003] EWHC 645 (Ch); [2003] ICR 1149
Synstar Computer Services (UK) Ltd v ICL (Sorbus) Ltd [2002] ICR 112
Sysdeco v Atkins. *See* Dickie v Cathay Pacific Airways Ltd

Tasci v Pekalp of London Ltd [2001] ICR 633, CA
Taylor v OCS Group Ltd [2006] EWCA Civ 702; [2006] ICR 1602, CA
Teinaz v Wandsworth London Borough Council [2002] EWCA Civ 1040; [2002] ICR 1471, CA
Tele Danmark A/S v Handels- og Kontorfunktionærernes Forbund i Danmark (HK) (acting on behalf of Brandt-Nielsen) (Case C-109/00) [2004] ICR 610, ECJ
Thomas v Farr plc [2007] EWCA Civ 118; [2007] ICR 932, CA
Thornett v Scope [2006] EWCA Civ 1600; [2007] ICR 236, CA
Thorpe v Dul [2003] ICR 1556, EAT
Titchener v Secretary of State for Trade and Industry [2002] ICR 225, EAT
Tooby v Post Office Ltd. *See* Wolstenholme v Post Office Ltd
Topping v Benchtown Ltd (formerly Jones Bros Preston Ltd). *See* Rothwell v Chemical & Insulating Co Ltd
Tran v Greenwich Vietnam Community Project [2002] EWCA Civ 553; [2002] ICR 1101, CA
Transco plc v O'Brien [2002] EWCA Civ 379; [2002] ICR 721, CA
Transport & General Workers' Union v McKinnon, J R Haulage Ltd [2001] ICR 1281, EAT(Sc)
Transport and General Workers' Union v Brauer Coley Ltd [2007] ICR 226, EAT
Transport and General Workers' Union v Swissport (UK) Ltd [2007] ICR 1593, EAT
Truelove v Safeway Stores plc [2005] ICR 589, EAT
Trustee Solutions Ltd v Dubery [2006] EWHC 1426 (Ch); [2007] ICR 412
Turner v Grovit [2001] UKHL 65; [2002] ICR 94, HL(E)
Turner v Grovit (Case C-159/02) [2005] ICR 23, ECJ
Tyne and Wear Autistic Society v Smith [2005] ICR 663, EAT
Tyne and Wear Passenger Transport Executive (trading as Nexus) v Best [2007] ICR 523, EAT

Universities Superannuation Scheme Ltd v Simpson [2004] EWHC 935 (Ch); [2004] ICR 1426
University of East London v Hinton [2005] EWCA Civ 532; [2005] ICR 1260, CA
University of Huddersfield v Wolff [2004] ICR 828, EAT

Vakante v Governing Body of Addey and Stanhope School (No 2) [2004] ICR 279, EAT; [2004] EWCA Civ 1065; [2005] ICR 231, CA; (pet dis) [2005] ICR 662, HL(E)
Venables v Hornby [2002] ICR 81; [2002] EWCA Civ 1277; [2003] ICR 186, CA; [2003] UKHL 65; [2004] ICR 42, HL(E)
Vento v Chief Constable of the West Yorkshire Police [2002] EWCA Civ 1871; [2003] ICR 318, CA
Verdin v Harrods Ltd [2006] ICR 396, EAT
Viasystems (Tyneside) Ltd v Thermal Transfer (Northern) Ltd [2005] EWCA Civ 1151; [2006] ICR 327, CA
Villalba v Merrill Lynch & Co Inc [2007] ICR 469, EAT
Vincent v M J Gallagher Contractors Ltd [2003] EWCA Civ 640; [2003] ICR 1244, CA
Virgo Fidelis Senior School v Boyle [2004] ICR 1210, EAT
Voith Turbo Ltd v Stowe [2005] ICR 543, EAT
Volkswagen AG v Commission of the European Communities (Case T-208/01) [2004] ICR 1197, CFI
Volkswagen AG v Commission of the European Communities (Case C-74/04P) [2007] ICR 217, ECJ
Voteforce Associates Ltd v Quinn [2002] ICR 1, EAT

Wain v Guernsey Ship Management Ltd [2007] EWCA Civ 294; [2007] ICR 1350, CA
Wall v British Compressed Air Society [2003] EWCA Civ 1762; [2004] ICR 408, CA
Walter v Secretary of State for Social Security [2001] EWCA Civ 1913; [2002] ICR 540, CA
Walton v Independent Living Organisation Ltd [2002] ICR 1406, EAT; [2003] EWCA Civ 199; [2003] ICR 688, CA
Watson v General Medical Council [2005] EWHC 1896 (Admin); [2006] ICR 113
Way v Crouch [2005] ICR 1362, EAT
Weber v Universal Ogden Services Ltd (Case C-37/00) [2002] ICR 979, ECJ

Webley v Department for Work and Pensions [2004] EWCA Civ 1745; [2005] ICR 577, CA; (pet dis) [2005] ICR 1161, HL(E)
Webster v Brunel University. *See* Igen Ltd (formerly Leeds Career Guidance) v Wong
Weir v Chief Constable of Merseyside Police [2003] EWCA Civ 111; [2003] ICR 708, CA
Weir Valves & Controls (UK) Ltd v Armitage [2004] ICR 371, EAT
Westminster City Council v UNISON [2001] EWCA Civ 443; [2001] ICR 1046, CA
Wheeldon v HSBC Bank plc. *See* Hartman v South Essex Mental Health and Community Care NHS Trust
Wheeler v Quality Deep Ltd (trading as Thai Royale Restaurant) [2004] EWCA Civ 1085; [2005] ICR 265, CA
Whiffen v Milham Ford Girls' School [2001] EWCA Civ 385; [2001] ICR 1023, CA
Whitbread plc (trading as Whitbread Medway Inns) v Hall [2001] ICR 699, CA
Whitely v Marton Electrical Ltd [2003] ICR 495, EAT
Whittaker v P & D Watson (trading as P & M Watson Haulage) [2002] ICR 1244, EAT
Wiggins v North Yorkshire County Council. *See* Smith v A J Morrisroes & Sons Ltd
Wilding v British Telecommunications plc [2002] EWCA Civ 349; [2002] ICR 1079, CA
Williams v Southampton Institute. *See* Dunnachie v Kingston upon Hull City Council
Willow Oak Developments Ltd (trading as Windsor Recruitment) v Silverwood [2006] ICR 55, EAT; [2006] EWCA Civ 660; [2006] ICR 1552, CA
Wilson v Stockton-on-Tees Borough Council. *See* Clarke v Redcar and Cleveland Borough Council
Wippel v Peek & Cloppenburg GmbH & Co KG (Case C-313/02) [2005] ICR 1604, ECJ
Wise Group v Mitchell [2005] ICR 896, EAT
Wolstenholme v Post Office Ltd [2003] ICR 546, EAT
Woodward v Abbey National plc (No 1) [2005] ICR 1750, EAT; [2006] EWCA Civ 822; [2006] ICR 1436, CA
Woodward v Abbey National plc (No 2) [2005] ICR 1702, EAT
Wright v Governing Body of Bilton High School [2002] ICR 1463, EAT

X v Comr of Police of the Metropolis [2003] ICR 1031, EAT
X v Y [2003] ICR 1138, EAT; [2004] EWCA Civ 662; [2004] ICR 1634, CA

Yearwood v Comr of Police of the Metropolis [2004] ICR 1660, EAT
Yemen (Republic of) v Aziz [2005] EWCA Civ 745; [2005] ICR 1391, CA
Young v National Power plc [2001] ICR 328, CA

Ziemann v Ziemann Sicherheit GmbH (Case C-247/96). *See* Sánchez Hidalgo v Asociación de Servicios Aser (Case C-173/96) (Note)
Zietsman (trading as Berkshire Orthodontics) v Stubbington [2002] ICR 249, EAT

SUBJECT MATTER TITLES

Main titles under which cases are indexed

Agency

Bankruptcy
Building

Competition
Confidential information
Conflict of laws
Contract
Crime
Crown proceedings

Damages
Discrimination

Education
Employment
Estoppel
European Community
Evidence

Factory
Fatal Accidents Acts

Health and safety
Human rights

Immigration
Industrial relations
Injunction
Insolvency

Judicial review

Limitation of action

Medical practitioner

Natural justice
Negligence

Occupiers' liability

Police
Practice

Restraint of trade
Restrictive practices
Revenue

Social security

Tort
Trade dispute
Trade union
Tribunal
Trusts

Vicarious liability

Words and phrases

SUBJECT MATTER

ICR 2001–2007

AGENCY

Ratification

Unauthorised act

Trade union presenting complaints of unfair dismissal on behalf of members without authorisation — Members approving proceedings after expiry of time limit — Whether valid ratification of complaint — Employment Rights Act 1996, s 111(2)
Nottinghamshire Healthcare NHS Trust v Prison Officers' Association, EAT [2003] ICR 1192

Termination

Compensation

Agency terminated due to closure of principal's business — Agent claiming two years' gross commission — Whether appropriate — Whether state of principal's business relevant — Correct basis for assessing compensation — Commercial Agents (Council Directive) Regulations 1993, reg 17 — Council Directive 86/653/EEC, art 17
Lonsdale (trading as Lonsdale Agencies) v Howard & Hallam Ltd, CA [2006] ICR 584
Lonsdale (trading as Lonsdale Agencies) v Howard & Hallam Ltd (Winemakers' Federation of Australia Inc intervening), HL(E) [2007] ICR 1338

BANKRUPTCY

Debt

Overpayment of jobseeker's allowance

Claimant in receipt of benefit declared bankrupt — Secretary of State determining benefit overpaid prior to bankruptcy recoverable — Whether overpayment contingent liability at date of bankruptcy — Whether "bankruptcy debt" releasing claimant from liability — Insolvency Act 1986, s 382 — Social Security Administration Act 1992, s 71(1)
R (Steele) v Birmingham City Council, CA [2006] ICR 869

Property passing to trustee

Chose in action

Complaint of race discrimination — Whether property of bankrupt applicant vesting in trustee — Insolvency Act 1986, ss 283(1), 306, 436 **Khan v Trident Safeguards Ltd**, CA [2004] ICR 1591

Complaint of unfair dismissal — Whether "property" of bankrupt applicant vesting in trustee — Insolvency Act 1986, ss 283(1), 306, 436 **Grady v Prison Service**, EAT and CA [2003] ICR 753

Pension and annuity policies

Self-employed bankrupt's retirement annuity contract forming part of estate on bankruptcy — Bankruptcy order made and trustee in bankruptcy appointed before human rights legislation in force — Bankrupt following discharge applying to prevent trustee using pension benefits to pay creditors — Whether discrimination in enjoyment of possessions compared with employee with occupational pension forfeiting on bankruptcy — Insolvency Act 1986, ss 283(1), 436 — Human Rights Act 1998, Sch 1, Pt I, art 14, Pt II, art 1 **In re Malcolm**, CA [2005] ICR 611

BUILDING

Safety regulations

Subcontractor

Property owner using building contractor to convert premises — Workman injured falling from ladder — Whether owner having control over construction work — Whether liability established by failure to ensure preparation of safety plan — Occupiers' Liability Act 1957, s 2 — Construction (Design and Management) Regulations 1994, reg 10 — Construction (Health, Safety and Welfare) Regulations 1996, reg 4(2) **McCook v Lobo**, CA [2003] ICR 89

COMPETITION

Dominant position

Abuse of

Dominant trader in United Kingdom map market planning to market own digital images from "one-stop-shop" website — Whether use of market power in dominant market to gain competitive advantage in related market abuse of dominant position — Whether use of public funds to enter new market constituting abuse — Competition Act 1998, s 18
Getmapping plc v Ordnance Survey, Laddie J [2003] ICR 1

COMPETITION—*continued*

Investigatory powers

Commission of European Communities

Undertaking suspected of breaching competition rules — Application to domestic court for authorisation to enter undertaking's premises and seize documents — Nature of examination to be undertaken by court — Materials to be supplied to court by Commission — Council Regulation (EEC) No 17/62, art 14

Roquette Frères SA v Directeur général de la concurrence, de la consommation et de la répression des fraudes (Commission of the European Communities, Third party) (Case C-94/00) ECJ [2004] ICR 66

Compatibility with Convention rights

Office of Fair Trading commencing investigation into suspected price fixing — Application for warrant to enter defendant's premises — Statutory conditions for grant of warrant satisfied — Whether warrant procedure compatible with Convention rights to fair trial and respect for private and family life, home and correspondence — Whether warrant to be granted — Competition Act 1998, s 28(1)(b) — Human Rights Act 1998, Sch 1, Pt I, arts 6, 8

Office of Fair Trading v X, Morison J [2004] ICR 105

Merger

Reference to Competition Commission

Complaint to Office of Fair Trading — Office of Fair Trading believing merger not expected to result in substantial lessening of competition and declining to refer to Commission — Competition Appeal Tribunal formulating test requiring Office of Fair Trading to be further satisfied no significant prospect of alternative view being taken by Commission — Whether correct test — Whether appeal tribunal properly applying principles of judicial review — Enterprise Act 2002, ss 33(1), 120(4) **IBA Healthcare Ltd v Office of Fair Trading,** CA [2004] ICR 1364

Restriction or distortion of competition *see also* EUROPEAN COMMUNITY: **Free competition**

Anti-competitive agreement

Dealers contracting with manufacturer to comply with its instructions — Price-fixing calls by manufacturer not acceded to by dealers — Whether dealers deemed to have accepted in advance unlawful variations of contract — Whether anti-competitive agreement by virtue of dealers' acquiescence — EC Treaty, art 81(1) EC

Volkswagen AG v Commission of the European Communities (Case T-208/01), CFI [2004] ICR 1197

Lawful agreement by dealers to comply with manufacturer's instructions — Issue of anti-competitive instructions — Whether "agreement" between manufacturer and dealers as to unlawful instructions — Whether possible for dealers to be regarded as having accepted in advance unlawful variations of lawful contract — EC Treaty, art 81(1) EC

Volkswagen AG v Commission of the European Communities (Case C-74/04P), ECJ [2007] ICR 217

Parallel imports of medicinal products into member state by wholesalers in other states — Manufacturer's restriction of deliveries to wholesalers — Whether wholesalers acquiescing in manufacturer's conduct by maintaining commercial relations — Whether anti-competitive agreement between manufacturer and wholesalers — EC Treaty, art 85(1)

Bayer AG v Commission of the European Communities (Cases C-2/01P and C-3/01P), ECJ [2005] ICR 834

CONFIDENTIAL INFORMATION

Breach of confidence

Contract for services

Written confidentiality agreement — Confidential information disclosed to media in breach of contract — Whether client's wrongful repudiation discharging obligation of confidentiality — Whether disclosure justified by public interest — Whether issues suitable for summary disposal — CPR r 24.2 **Campbell v Frisbee,** CA [2003] ICR 141

CONFLICT OF LAWS

Jurisdiction

Anti-suit injunctions see INJUNCTION: **Jurisdiction to grant:** *Restraint of foreign proceedings*

Jurisdiction under European Convention

Employment

Employee working on marine installations initially over one state's continental shelf and later in another's territorial waters — Whether work over continental shelf work in that state — State "where the employee habitually carries out his work" — Determination of appropriate forum for employee's action against employer — Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1968 (as amended), art 5(1)

Weber v Universal Ogden Services Ltd (Case C-37/00), ECJ [2002] ICR 979

CONFLICT OF LAWS—*continued*

Sovereign immunity

Contract of employment

Embassy employee's complaint of unfair dismissal — Notice of appearance entered by solicitors on behalf of embassy — Embassy claiming state immunity — Duty of Employment Appeal Tribunal — Whether appeal tribunal right to accept evidence notice of appearance not authorised by head of mission — Whether head of mission having power to delegate authority to submit to jurisdiction — State Immunity Act 1978, s 2(3)(7) **Republic of Yemen v Aziz,** CA [2005] ICR 1391

CONTRACT

Illegality

Enforceability

Contract liable to restrict or distort competition — Loss to one party caused by restriction of competition — Whether damages recoverable from other party — Whether claim barred by illegality of contract — EC Treaty, art 85 (art 81 EC) **Courage Ltd v Crehan (Case C-453/99),** ECJ [2002] ICR 457

COSTS

Discretion of court *see* OCCUPIERS' LIABILITY: **Visitor:** *Building works*

CRIME

Sentence

Gross negligence manslaughter

Business using dangerous machinery with non-functioning safety devices — Employee fatally injured — Business run by hands-on managing director — Likelihood of business collapsing if director receiving immediate custodial sentence — Whether impact of closure on employees exceptional circumstance justifying director receiving suspended sentence — Whether suspended sentence unduly lenient **Attorney General's Reference (No 86 of 2006),** CA [2007] ICR 1047

Theft

Obtaining pecuniary advantage by deception

Application for employment with police — Defendant conditionally discharged nine years earlier — Answering "No" when asked whether "convicted" of an offence — Whether false statement — Whether distinction between being "convicted" and "conviction" — Powers of Criminal Courts (Sentencing) Act 2000, s 14(1) **R v Patel,** CA [2007] ICR 571

CROWN PROCEEDINGS

Tort, liability of Crown

Armed forces

Serviceman claiming in tort for injury during service — Statute exempting Crown from liability in tort — Whether exemption substantive or procedural — Whether incompatible with right to fair trial — Crown Proceedings Act 1947, s 10 — Human Rights Act 1998, Sch 1, Pt I, art 6(1)
Matthews v Ministry of Defence, CA [2002] ICR 1003
HL(E) [2003] ICR 247

DAMAGES

Earnings, loss of

Causation

Employee injured in accident at work — Employer demoting employee after finding gross misconduct in relation to accident — Proceedings by employee for negligence and breach of statutory duty — Liability agreed at 85% to employer and 15% to employee — Whether employee entitled to claim loss of earnings consequent on demotion **Casey v Morane Ltd,** CA [2001] ICR 316

Future earnings

Claimant employed as merchant seaman concealing medical condition prohibiting work as seafarer — Claimant's injury at work resulting in revelation of condition and dismissal — Claim for loss of future earnings as seaman — Whether claimant's reliance on deception collateral to claim or insignificant — Whether claim precluded by public policy
Hewison v Meridian Shipping Services PTE Ltd, CA [2003] ICR 766

Personal injuries

Provisional damages see NEGLIGENCE: **Causation:** *Asbestos exposure*

Statutory compensation

Award for mesothelioma — Action in negligence against factory exposing claimant to asbestos — Whether statutory compensation deductible from damages — Whether deductible only from certain heads of damage — Pneumoconiosis etc (Workers' Compensation) Act 1979, ss 1(1), 2(1) **Ballantine v Newalls Insulation Co Ltd,** CA [2001] ICR 25

DISCRIMINATION

Bodies other than employers

Organisation of workers

Doctor seeking advice from medical protection society — Whether "organisation of workers" — Race Relations Act 1976, s 11(1) **Medical Protection Society v Sadek,** CA [2004] ICR 1263

Partnership

Partnership of two doctors — Complaint of sex discrimination by one against the other — Whether respondent partner "a firm" — Whether tribunal having jurisdiction to hear complaint — Partnership Act 1890, s 5 — Sex Discrimination Act 1975, s 11(1) (as amended by Sex Discrimination Act 1986, s 1(3)) **Dave v Robinska** , EAT [2003] ICR 1248

Trade organisation

Barristers' chambers — Application for pupillage — Whether "application for membership" of trade organisation — Disability Discrimination Act 1995, s 13 **Higham v Horton,** CA [2005] ICR 292

Damages

Compensation

Assessment — Award of two and a half years' future loss of earnings and 10 years' future pension loss — Single deduction of 5% of total compensation to take account of accelerated payment — Whether correct — Whether interest payable on gross award without allowance for tax and national insurance **Bentwood Bros (Manchester) Ltd v Shepherd,** CA [2003] ICR 1000

Assessment — Company foreman making racially abusive comment about employee — Employee reacting severely and becoming too depressed to work — Whether company liable only for reasonably foreseeable losses — Race Relations Act 1976, ss 54(1), 56(1), 57
Essa v Laing Ltd, EAT [2003] ICR 1110
CA [2004] ICR 746

Earnings, loss of — Employee unable to find comparable employment undertaking retraining — Whether employer liable for loss of earnings during period of retraining — Whether award for injury to feelings taxable — Sex Discrimination Act 1975, s 66(4) — Income and Corporation Taxes Act 1988, s 148, Sch 11, para 3 (as substituted by Finance Act 1988, s 58(1), Sch 9) — Income Tax (Earnings and Pensions) Act 2003, s 406 **Orthet Ltd v Vince-Cain,** EAT [2005] ICR 374

Injury to feelings see also *Contribution*
Race: *Employment*: Discriminatory act

Campaign of demoralising and aggressive sexual harassment by fellow police officers — Award of £65,000 for injury to feelings including £15,000 aggravated damages — Whether excessive — Appropriate ranges for awards — Compensation for loss of future earnings — Tribunal assessing applicant's chance of completing career at 75% — Whether appeal tribunal entitled to interfere — Relevance of statistics **Vento v Chief Constable of the West Yorkshire Police,** CA [2003] ICR 318

Injury to feelings *see* Earnings, loss of

Loss of earnings — Employer discriminating against disabled employee — Employee subsequently disciplined and dismissed — Tribunal finding discrimination unlawful and dismissal unfair — Whether employer entitled to rely on unfair dismissal as breaking chain of causation when assessing loss of earnings — Whether compensation for loss of earnings limited to statutory maximum for unfair dismissal **Prison Service v Beart (No 2),** CA [2005] ICR 1206

Mitigation *see* EMPLOYMENT: **Unfair dismissal:** *Compensation*: Assessment

Pension rights — Calculation of pension loss — Correct approach
Greenhoff v Barnsley Metropolitan Borough Council (Practice Note), EAT [2006] ICR 1514

Contribution

Complaint of sex discrimination upheld against employer and manager — Manager found to have fostered discriminatory culture targeted at claimant — Whether aiding unlawful acts — Whether appropriate to award compensation on joint and several basis — Discrimination involving deliberate bullying of pregnant employee and total disregard for her welfare — Whether award of £25,000 for injury to feelings excessive — Sex Discrimination Act 1975, s 42 **Miles v Gilbank,** CA [2006] ICR 1297

Complaint of sex discrimination upheld against employer and managing director — Whether appropriate to award compensation on joint and several basis — Discrimination involving deliberate bullying of pregnant employee and total disregard for her welfare — Whether award of £25,000 for injury to feelings excessive — Sex Discrimination Act 1975, s 42
Miles v Gilbank, EAT [2006] ICR 12

DISCRIMINATION—*continued*

Damages—*continued*

Contribution—continued

Complaint of sex discrimination upheld against employer and managing director — Whether power to award compensation on joint and several basis — When appropriate — Sex Discrimination Act 1975, s 65(1) — Civil Liability (Contribution) Act 1978, s 2(1)
Way v Crouch, EAT [2005] ICR 1362

Disability

Compensation

Calculation of future loss — Insurance scheme paying proportion of salary for sick employee — Scheme funded by employer — Employee having no contractual right to payment — Whether credit to be given for payments when assessing future loss — Disability Discrimination Act 1995, s 8(3) **Atos Origin IT Services UK Ltd v Haddock,** EAT [2005] ICR 277

Disability-related

Claimant employee not disabled caring for disabled son — Whether concept of associative disability discrimination capable of inclusion in principle of equal treatment — Whether question to be referred to Court of Justice — Disability Discrimination Act 1995, ss 3A, 3B, 4 (as inserted by Disability Discrimination Act 1995 (Amendment) Regulations 2003, regs 4, 5) — Council Directive 2000/78/EC, arts 1, 2(2) **Attridge Law v Coleman,**
EAT [2007] ICR 654

Disabled person

Applicant refused post because of possibility of violent behaviour caused by paranoid schizophrenia — Whether tendency to physical abuse deemed not to amount to impairment — Whether refusal of post discrimination for reason relating to disability — Whether justified — Disability Discrimination Act 1995, ss 1(1), 5(1), Sch 1, para 1(2)(b) — Disability Discrimination (Meaning of Disability) Regulations 1996, reg 4(1)(c)
Murray v Newham Citizens Advice Bureau Ltd (No 2), EAT [2003] ICR 643

Chief inspector of police diagnosed as dyslexic — Requiring extra time to complete examinations for promotion — Whether "normal day-to-day activities" — Whether effect substantial — Whether comparison with population at large — Disability Discrimination Act 1995, s 1, Sch 1, para 4(1)(g) **Paterson v Comr of Police of the Metropolis,** EAT [2007] ICR 1522

Dismissal of employee on ground of sickness — Whether precluded by EC Directive for combating discrimination on ground of disability — Whether sickness "disability" — Council Directive 2000/78/EC, art 1 **Chacón Navas v Eurest Colectividades SA (Case C-13/05),**
ECJ [2007] ICR 1

Employee absent from work while suffering psychiatric condition impairing memory and concentration — Impairment ceasing to have substantial adverse effect and employee returning to work — Complaint of failure by employer to make adjustments — Whether effect of impairment likely to recur — Whether impairment to be treated as continuing to have substantial adverse effect — Disability Discrimination Act 1995, s 1(1), Sch 1, para 2(2)
Swift v Chief Constable of Wiltshire Constabulary, EAT [2004] ICR 909

Employee suffering from asthma — Asthma exacerbated by exposure to fumes in workplace — Employee dismissed on health grounds — Asthma less severe when employee not working — When effect of impairment to be assessed — Disability Discrimination Act 1995, s 1(1)
Cruickshank v VAW Motorcast Ltd, EAT [2002] ICR 729

Employee with cancer undergoing surgery resulting in minor incontinence — Whether incontinence "as a result of" condition of cancer — Whether impairment to be taken to have substantial adverse effect because of progressive condition — Disability Discrimination Act 1995, s 1(1), Sch 1, para 8(1) **Kirton v Tetrosyl Ltd** , EAT [2003] ICR 37
CA [2003] ICR 1237

Long-term effect — Claimant suffering from persistent delusional disorder subjected to detention under Mental Health Act 1983 — Whether effect of impairment substantial and adverse — Whether long-term — Whether recurrence of condition subsequent to alleged discrimination relevant — Disability Discrimination Act 1995, s 1(1), Sch 1, paras 2(1), 4(1)(g)
McDougall v Richmond Adult Community College, EAT [2007] ICR 1567

Impairment

Claimant suffering from learning difficulties — Whether "mental impairment" — Whether evidence of educational psychologist sufficient — Disability Discrimination Act 1995, s 1(1), Sch 1, para 1(1) **Dunham v Ashford Windows Ltd,** EAT [2005] ICR 1584

Medical notes indicating applicant suffering from stress and depression — No informed medical diagnosis — Whether mental impairment established — Disability Discrimination Act 1995, s 1(1), Sch 1, para 1 **Morgan v Staffordshire University,** EAT [2002] ICR 475

DISCRIMINATION—*continued*
Disability—*continued*
Disabled person—continued
Impairment—*continued*

No organic explanation for symptoms affecting employee's movements and activities — No evidence of diagnosable metal disorder — Whether tribunal entitled to find no "impairment" — Disability Discrimination Act 1995, s 1, Sch 1, para 1
McNicol v Balfour Beatty Rail Maintenance Ltd, CA [2002] ICR 1498

No organic explanation for symptoms affecting employee's movements and activities — Whether physical impairment — No evidence of diagnosable mental disorder — Whether mental impairment — Disability Discrimination Act 1995, s 1, Sch 1, para 1
Rugamer v Sony Music Entertainment UK Ltd, EAT [2002] ICR 381

Long-term effect

Impairment lasting for 9 months — Whether "likely" to last for 12 months — 50% risk of recurrence — Whether "likely" to recur — Disability Discrimination Act 1995, s 1(1), Sch 1, para 2(1)(2) **Latchman v Reed Business Information Ltd,** EAT [2002] ICR 1453

Treatment

Employee suffering damage to hearing and post-traumatic stress — Inability to travel by plane or underground — Whether substantial adverse effect on ability to carry out normal day-to-day activities — Whether effect of treatment to be taken into account — Whether employee disabled — Tribunal's approach to medical evidence — Disability Discrimination Act 1995, s 1, Sch 1, paras 4(1), 6(1) **Abadeh v British Telecommunications plc,** EAT [2001] ICR 156

Whether impairment affecting normal day-to-day activities — Tribunal having regard to activities applicant able to do as well as those unable — Correct approach — Disability Discrimination Act 1995, s 1(1), Sch 1, para 4(1) **Ekpe v Comr of Police of the Metropolis,** EAT [2001] ICR 1084

Disability-related: see *Employment:* Duty to make adjustments

Employment
Arrangements for applicants

Volunteer adviser training programme — Whether "arrangements . . . for the purpose of determining to whom to offer employment" — Agreement between advice bureau and trainee volunteer adviser — Whether contract personally to do any work — Disability Discrimination Act 1995, ss 4(1)(a), 68(1) **Murray v Newham Citizens Advice Bureau,** EAT [2001] ICR 708

Constructive dismissal

Employee faced with possibility of redundancy resigning through ill-health — Whether dismissed — Whether constructive dismissal within meaning of "dismissing" — Disability Discrimination Act 1995, s 4(2)(d) **Catherall v Michelin Tyres plc,** EAT [2003] ICR 28

Employee subjected to discriminatory conduct by employer resigning following failure to agree terms for return to work — Whether constructively dismissed — Whether constructive dismissal within meaning of "dismissing" — Employee's sickness benefit reduced pursuant to employer's long term absence policy — Whether discrimination — Whether justifiable — Disability Discrimination Act 1995, ss 4(2), 5(5), 6(11)
Meikle v Nottinghamshire County Council, CA [2005] ICR 1

Discriminatory act

Employee resigning following demotion — Whether employer discriminating "by dismissing" her — Disability Discrimination Act 1995, s 4(2)(d), Sch 3, para 3(1)
Comr of Police of the Metropolis v Harley, EAT [2001] ICR 927

Duty to make adjustments

Applicant offered place on sales training course — Employer deciding applicant unable to carry heavy sales aid and withdrawing offer — Applicant's suggestion of alternative sales methods rejected — Relevant "arrangements" made by employer — Whether placing applicant at substantial disadvantage — Proper comparators — Whether discrimination — Whether justified — Disability Discrimination Act 1995, ss 5(1)(2)(5), 6(1)
Smith v Churchill Stairlifts plc, CA [2006] ICR 524

Claimant absent due to disability receiving reduced sick pay under employer's long term absence policy — Whether placed at substantial disadvantage — Whether failure by employer to make reasonable adjustments — Whether disability-related less favourable treatment — Whether excessive cost of providing full pay to disabled employees on long term absence justifying any discrimination — Disability Discrimination Act 1995, ss 3A, 4A (as inserted by Disability Discrimination Act 1995 (Amendment) Regulations 2003, regs 4(2), 5) **O'Hanlon v Revenue and Customs Comrs,** EAT [2006] ICR 1579
CA [2007] ICR 1359

DISCRIMINATION—*continued*

Disability—*continued*

Employment—*continued*

Duty to make adjustments—*continued*

Employee becoming unable to carry out manual duties owing to onset of disability — Employer retraining employee and shortlisting for all suitable sedentary posts — Employee failing to secure position — Whether duty to take "reasonable steps" requiring employer to dispense with need for competitive interviews — Local Government and Housing Act 1989, s 7 — Disability Discrimination Act 1995, ss 4(2), 5(1)(2)(5), 6 **Archibald v Fife Council,** HL(Sc) [2004] ICR 954

Employer refusing to consider employee's harassment complaint while disciplinary proceedings against her pending — Whether failure to make reasonable adjustment — Whether employers' ignorance of duty precluding justification — Disability Discrimination Act 1995, ss 5, 6 **Johnson & Johnson Medical Ltd v Filmer,** EAT [2002] ICR 292

Excluded classes

Advice bureau staffed by paid workers and volunteers — Whether volunteers "employees" for purposes of small business exemption — Disability Discrimination Act 1995, ss 7(1) (as substituted by Disability Discrimination (Exemption for Small Employers) Order 1998, art 2), 68(1) **South East Sheffield Citizens Advice Bureau v Grayson,** EAT [2004] ICR 1138

Occupational health consultant recommending relocation of employee suffering from depression — Recommendation not acted on — Employee subsequently disciplined and dismissed — Whether failure to make reasonable adjustments — Whether justification in issue — Disability Discrimination Act 1995, ss 5(2), 6 **Prison Service v Beart,** CA [2003] ICR 1068

Former employee

Complaints of discrimination and victimisation based on events after termination of employment — Whether jurisdiction to consider complaints — Disability Discrimination Act 1995, s 4(2) **Jones v 3M Healthcare Ltd,** EAT [2002] ICR 341
CA [2002] ICR 1124
HL(E) [2003] ICR 867

Dismissal for ill-health upheld on internal appeal — Complaint of failure to make reasonable adjustments including employers' rejection of claimant's post-dismissal request to revoke dismissal — Whether "act extending over a period" — Whether jurisdiction to consider post-dismissal claim — Complaint 2 days out of time due to secretarial oversight — Whether just and equitable to extend time — Disability Discrimination Act 1995, s 6(1), Sch 3, para 3 **Baynton v South West Trains Ltd,** EAT [2005] ICR 1730

Less favourable treatment: see also EDUCATION: **Teacher:** *Discrimination*

Dismissal for misconduct — Deaf employee disadvantaged during dismissal procedure — Whether dismissed for reason relating to his disability — Whether necessary to show employer had disability-related reason in mind when dismissing — Disability Discrimination Act 1995, s 5(1)(a) **Taylor v OCS Group Ltd,** CA [2006] ICR 1602

Employee suffering from chronic anxiety — Dismissed because of inability to work with new assistant — Whether discrimination for reason relating to disability — Whether provision of assistant "arrangement" made by employer — Need for tribunal to carry out analysis of employee's disability in work context — Disability Discrimination Act 1995, ss 5, 6 **Edwards v Mid-Suffolk District Council,** CA [2001] ICR 616

Employee suffering from depressive illness — Dismissed for misconduct following disciplinary proceedings held in absence on sick leave — Tribunal finding failure to make reasonable adjustments in relation to disciplinary proceedings — Whether also less favourable treatment — Tribunal finding employers' reasons for dismissal unjustified but unrelated to disability — Whether inference of discrimination to be drawn — Disability Discrimination Act 1995, s 5(1) **Rowden v Dutton Gregory,** EAT [2002] ICR 971

Justification of treatment — Diabetic becoming insulin-dependent withdrawn from driving duties — Employer later revising policy and offering restricted driving duties — Whether open to employment tribunal to review employer's assessment of risk — Disability Discrimination Act 1995, s 5(3) **Post Office v Jones,** CA [2001] ICR 805

Impairment

Employee suffering from depression dismissed following offences of indecent exposure — Exhibitionism not to be treated as impairment — Whether dismissal for reason relating to employee's disability — Disability Discrimination Act 1995, ss 1(1), 5(1) — Disability Discrimination (Meaning of Disability) Regulations 1996, reg 4(1) **Edmund Nuttall Ltd v Butterfield,** EAT [2006] ICR 77

DISCRIMINATION—*continued*
Disability—*continued*
School
Less favourable treatment

Pupil suffering from autistic disorder excluded from school for bad behaviour — Whether proper comparator child neither disabled nor badly behaved — Disability Discrimination Act 1995, s 28B (as inserted by Special Educational Needs and Disability Act 2001, s 12)
McAuley Catholic High School v C, Silber J [2004] ICR 1563

Employment
Aiding unlawful acts see **Damages:** *Contribution*

Authorisation or qualification

Applicant refused entry to grade of specialist registrar on ground post held not meeting approval criteria of regulatory committee — Whether continuing discriminatory act — Separate complaints in different tribunals against same parties raising similar claims — Whether abuse of process — Refusal by specialist training authority to enter applicant on specialist register — Appeal panel of authority dismissing appeal — Whether act complained of that of authority or appeal panel — Whether jurisdiction in employment tribunal to hear complaint — Race Relations Act 1976, ss 12, 54(2), 68(7) — European Specialist Medical Qualifications Order 1995, art 12 (as amended by European Specialist Medical Qualifications Amendment Regulations 1997, para 2(4)) **Chaudhary v Royal College of Surgeons,** CA [2003] ICR 1510

Applicant seeking election to Scottish Parliament on job-share basis — Complaint of sex discrimination — Whether employment tribunal having jurisdiction — Sex Discrimination Act 1975, s 13(1) **Secretary of State for Scotland v Mann,** EAT(Sc) [2001] ICR 1005

Applicants suspended from standing for or representing Labour Party in local elections — Whether Labour Party "body" able to confer "authorisation" needed for "engagement in a particular profession" — Whether local councillor engaged in profession — Whether employment tribunal having jurisdiction to entertain complaint — Whether members of Labour Party "section of the public" — Race Relations Act 1976, ss 12, 20(1), 25
Ali v McDonagh, CA [2002] ICR 1026

Refusal by specialist training authority to enter applicant on specialist register — Appeal panel of authority dismissing appeal — Applicant complaining dismissal discriminatory — Whether jurisdiction to hear complaint in absence of appeal from appeal panel — Whether effective remedy provided — Race Relations Act 1976, ss 12, 54(2) — Human Rights Act 1998, Sch 1, Pt I, art 6 — European Specialist Medical Qualifications Order 1995, art 13
Chaudhary v Specialist Training Authority Appeal Panel (No 2), CA [2005] ICR 1086

Sole principal solicitor seeking legal aid franchise for her firm from Legal Services Commission — Whether applicant for "employment" — Whether franchise "facilitates engagement in . . . profession" — Race Relations Act 1976, ss 4, 12, 78(1)
Patterson v Legal Services Commission, EAT and CA [2004] ICR 312

Burden of proof

Burden on claimant to establish facts capable of constituting unlawful discrimination — Burden shifting to employer to prove absence of discrimination — Proper approach — Sex Discrimination Act 1975, s 63A (as inserted by Sex Discrimination (Indirect Discrimination and Burden of Proof) Regulations 2001, reg 5) — Race Relations Act 1976, s 54A (as inserted by Race Relations Act 1976 (Amendment) Regulations 2003, reg 41)
Igen Ltd (formerly Leeds Careers Guidance) v Wong, CA [2005] ICR 931

Claim of bullying by supervisor — Tribunal accepting employers' evidence supervisor's conduct not racial and finding no prima facie case — Whether permissible for tribunal to take into account employers' evidence at that stage — Race Relations Act 1976, s 54(A) (as inserted by Race Relations Act 1976 (Amendment) Regulations 2003, reg 41)
Laing v Manchester City Council, EAT [2006] ICR 1519

Tribunal failing to apply two-stage approach to shifting burden — Employer required to explain reason for differential treatment — Whether statutory test satisfied — Race Relations Act 1976, s 54A (as inserted by Race Relations Act 1976 (Amendment) Regulations 2003, reg 41)
Brown v Croydon London Borough Council (Note), CA [2007] ICR 909

Contract for services

Self-employed taxi driver paying weekly fee to operators for access to customers — Whether contract "personally to execute any work or labour" — Race Relations Act 1976, s 78(1)
Mingeley v Pennock (trading as Amber Cars), CA [2004] ICR 727

DISCRIMINATION—*continued*
Employment—*continued*
Contract of employment
Illegality

Asylum-seeker obtaining employment in breach of condition of leave to remain — Whether illegality precluding race discrimination complaint against employer — Race Relations Act 1976, s 4(2)(b)(c) **Governing Body of Addey and Stanhope School v Vakante,** EAT [2003] ICR 290

Asylum-seeker obtaining employment in breach of condition of leave to remain — Whether illegality precluding race discrimination complaint against employer — Race Relations Act 1976, s 4(2)(b)(c) — Council Directive 2000/43/EC, art 7
Vakante v Governing Body of Addey and Stanhope School (No 2), EAT [2004] ICR 279
CA [2005] ICR 231

Contract worker see **Sex:** *Employment:* Requirement or condition
EMPLOYMENT: **Contract of employment:** *General practitioner*

Dismissed employee

Applicant complaining after dismissal of sexual harassment during employment — Employer rejecting complaint — Whether jurisdiction to hear complaint of discrimination in relation to employer's investigation of sexual harassment claim — Sex Discrimination Act 1975, s 6(2) — Council Directive 76/207/EEC, art 6 **Rhys-Harper v Relaxion Group plc,**
CA [2001] ICR 1176
HL(E) [2003] ICR 867

Establishment in Great Britain

Member of armed forces stationed abroad complaining of racial discrimination — Whether working "wholly or mainly outside Great Britain" — Whether applicant's "employment . . . at an establishment outside Great Britain" — Race Relations Act 1976, ss 4(1), 8(1)
Saggar v Ministry of Defence, CA [2005] ICR 1073

Military personnel stationed abroad complaining of acts of discrimination abroad — Whether working wholly outside Great Britain — Whether training course in Great Britain "work" — Whether one day's work in Great Britain de minimis — Sex Discrimination Act 1975, s 10(1) (as amended by Equal Opportunities (Employment Legislation) (Territorial Limits) Regulations 1999, reg 3(1)(2)) — Race Relations Act 1976, s 8(1) (as so amended)
Saggar v Ministry of Defence, EAT [2004] ICR 1708

Former employee

Complaints of discrimination relating to events after termination of employment — Whether jurisdiction to consider complaints — Sex Discrimination Act 1975, s 6(2) — Race Relations Act 1976, s 4(1)(2) — Disability Discrimination Act 1995, s 4(2)
Rhys-Harper v Relaxion Group plc, HL(E) [2003] ICR 867
D'Souza v Lambeth London Borough Council, HL(E) [2003] ICR 867
Jones v 3M Healthcare Ltd, HL(E) [2003] ICR 867

Complaint of victimisation on ground of sex — Applicant complaining termination of new employment due to unsolicited detrimental statement by former employer — Whether jurisdiction to consider complaint — Sex Discrimination Act 1975, s 6(2)
Metropolitan Police Service v Shoebridge, EAT [2004] ICR 1690

Letter to employer from former employer coming to employee's attention over 2 years later — Complaint of race discrimination against former employer — Whether just and equitable to extend time — Letter written prior to coming into effect of provision rendering unlawful discriminatory acts after end of employment relationship — Whether provision having retrospective effect — Whether letter unlawful act — Whether benefit arising from employment relationship — Race Relations Act 1976, ss 27A (as inserted by Race Relations Act 1976 (Amendment) Regulations 2003, reg 29), 68(6) **South East Essex College v Abegaze,** EAT [2006] ICR 468

Liability of employers and principals

Police — Chief officer appointing investigating and supervisory officers in disciplinary proceedings — Police officers complaining of discrimination by such officers — Whether chief officer liable — Whether delay rendering employment tribunal decision unsafe — Sex Discrimination Act 1975, s 41(2) — Race Relations Act 1976, s 32(2) — Police (Discipline) Regulations 1985, reg 6 — Police (Conduct) Regulations 1999, reg 8
Yearwood v Comr of Police of the Metropolis, EAT [2004] ICR 1660

DISCRIMINATION—*continued*

Employment—*continued*

Sex

Majority of female school catering staff settling equal pay claims — Employer's letter to all staff claiming that success of claims by minority likely to result in substantial reduction of meals service — Complaints by minority of victimisation — Whether less favourable treatment by reason of pursuing equal pay claims — Sex Discrimination Act 1975, ss 4(1)(a), 6(2)(b)
Derbyshire v St Helens Metropolitan Borough Council, CA [2006] ICR 90
Derbyshire v St Helens Metropolitan Borough Council (Equal Opportunities Commission intervening), HL(E) [2007] ICR 841

Evidence

Discriminatory act

Complaint of campaign of racial discrimination by superior detailed in originating application — Hearing limited to incidents within three months of originating application — No evidence given of acts referred to in originating application within period — Whether jurisdiction to consider evidence of acts not referred to in originating application — Race Relations Act 1976, s 54 **Ahuja v Inghams (Accountants),** CA [2002] ICR 1485

Onus of proof

Complaint of discrimination on grounds of race in relation to promotion — Piecemeal approach to evidence adopted by tribunal diminishing cumulative effect of primary facts — Whether decision flawed **Qureshi v Victoria University of Manchester (Note),** EAT [2001] ICR 863

Two equally qualified candidates for research post — Whether panel's choice affected by racial bias — Need to look for indicators apart from selection interview — Tribunal failing to record findings on relevant issues of fact — Whether decision flawed **Anya v University of Oxford,** CA [2001] ICR 847

Fixed-term employee

Less favourable treatment

Employment terminating by non-renewal after series of short fixed-term contracts — Whether capable of constituting less favourable treatment — Whether detriment — Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002, reg 3(1)
Webley v Departtment for Work and Pensions, CA [2005] ICR 577

Time limit

Payment of bonus limited to permanent employees — Announcement of bonus preceding prohibition on discrimination against fixed-term employees — Details of conditions for payment and payment after prohibition coming into force — When time starting to run — Whether less favourable treatment "on ground employee fixed-term employee" — Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002, regs 3(3)(a), 7(2)(a)(3)(a) **Coutts & Co plc v Cure,** EAT [2005] ICR 1098

Part-time worker

Judicial office holder

Part-time daily fee-paid tribunal chairman — Whether "worker" for purposes of Community law — Whether excluded class — Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000, regs 1, 17 — Council Directive 97/81/EC, recital (16), Annex, cl 2
Christie v Department for Constitutional Affairs, EAT [2007] ICR 1553

Reserve forces

Major in territorial army claiming denial of pension less favourable treatment — Provision excluding members of reserve forces from relying on right not to be treated less favourably where service voluntary — Whether employment tribunal jurisdiction to disapply provision if incompatible with Community law — Whether provision susceptible to judicial review — Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000, regs 5, 8(1), 13(2)
R (Manson) v Ministry of Defence, CA [2006] ICR 355

Race

Aiding unlawful acts

Gipsies booking council premises for wedding reception — Police providing inaccurate information about family to council — Council racially discriminating by imposing additional conditions on booking — Whether police knowingly aiding discrimination — Race Relations Act 1976, s 33(1) **Hallam v Avery,** HL(E) [2001] ICR 408

Assessors, role of

University student complaining of racial discrimination by supervisor — County court claim heard by judge and assessors — Whether assessors to assist judge in evaluating evidence — Whether having role in decision making process — Whether assessors' advice to be disclosed to parties prior to judgment — Whether to be recorded in judgment — Race Relations Act 1976, s 67(4) **Ahmed v Governing Body of the University of Oxford,** CA [2003] ICR 733

DISCRIMINATION—*continued*

Race—*continued*

Assessors, role of—continued

Student union officers expelled by university and excluded from premises — Student union treating employment contracts as ended — Whether university knowingly aiding dismissals — Race Relations Act 1976, s 33(1) **Anyanwu v South Bank Student Union (Commission for Racial Equality intervening),** HL(E) [2001] ICR 391

Burden of proof

Claim of victimisation — Whether reverse burden of proof to be applied — Race Relations Act 1976, s 54A (as inserted by Race Relations Act 1976 (Amendment) Regulations 2003, reg 41) — Council Directive 2000/43/EC, art 8 **Oyarce v Cheshire County Council,** EAT [2007] ICR 1693

Pupils excluded from school — Judge concluding on basis of all the evidence pupils failing to establish facts indicative of discrimination on racial grounds — Whether shifting burden of proof satisfied — Role of assessors in county court — Race Relations Act 1976, s 57ZA (as inserted by Race Relations Act 1976 (Amendment) Regulations 2003, reg 43) **Appiah v Governing Body of Bishop Douglass Roman Catholic High School (Note),** CA [2007] ICR 897

Employment

Applicant for employment

Trainee doctor seeking hospital placement under Secretary of State's scheme — Placements made by dean in consultation with specialist training committee — Appointed doctors employed by hospital trust — Employees of trust sitting on committee recommending applicant's placement at another hospital — Whether trust making "arrangements" for purpose of determining offer of employment — Whether trust refusing to offer employment — Race Relations Act 1976, ss 4(1), 13 (as substituted by Employment Act 1989, s 7(2)) **Hussain v King's College Hospital NHS Trust,** CA [2002] ICR 1433

Discriminatory act

Employee resigning following continuing racial abuse by foreman — Whether employer discriminating against employee by "dismissing" him — Whether "act extending over a period" — Award for injury to feelings — Injury varying in gravity at different times — Whether interest on award to run from start of discrimination — Race Relations Act 1976, ss 4(2)(c), 68(1)(7)(b) — Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996, reg 6(1)(a)(3) **Derby Fabrication Ltd v Burton,** EAT [2001] ICR 833

Harassment of employee

Applicant retaliating after racial attack by fellow employee on day out organised by employer — Whether "in the course of his employment" — Whether employer liable for attack by fellow employee — Employer's policy to dismiss employees using abusive language without regard to mitigating factors — Applicant dismissed under policy — Whether direct discrimination by employer — Race Relations Act 1976, ss 1(1)(a), 32(1) **Sidhu v Aerospace Composite Technology Ltd,** CA [2001] ICR 167

Less favourable treatment *see also* INDUSTRIAL RELATIONS: **Employment tribunals:** *Striking out proceedings*

Dismissal of British employees for redundancy — Whether Japanese secondees from parent company under contracts precluding dismissal valid comparators — Whether indirect discrimination — Race Relations Act 1976, ss 1(1)(a)(b), 3(4) **Hanly v Norinchukin International plc,** EAT [2003] ICR 1416

Employee suspended following unsubstantiated allegations of making offensive remarks — Whether employer's disciplinary code and considerations of fairness requiring reasonable grounds to suspect misconduct — Whether prior inquiry necessary — Whether refusal to allow employee to be accompanied or represented at initial interview less favourable treatment **Aziz v Crown Prosecution Service,** CA [2007] ICR 153

Employer provider of transport to persons of mainly Asian origin — Driver elected as BNP councillor dismissed on ground of risk to health and safety of employer's customers and employees — Whether treated less favourably "on racial grounds" — Whether indirect discrimination — Race Relations Act 1976, s 1(1)(a), (1A) (as inserted by Race Relations Act 1976 (Amendment) Regulations 2003, reg 3) **Redfearn v Serco Ltd (trading as West Yorkshire Transport Service),** CA [2006] ICR 1367

Police

Constable complaining of racial abuse by fellow constables — Whether chief constable liable — Race Relations Act 1976, ss 16(1), 32(1), 75 **Chief Constable of Bedfordshire Police v Liversidge,** CA [2002] ICR 1135

Requirement or condition *see also* **Sex:** *Employment:* Requirement or condition

DISCRIMINATION—*continued*

Race—*continued*

Employment—continued

Employee working for foreign government at school in England — Foreign employees at school receiving substantial relocation allowance not available to UK employees — Employer precluded from pleading justification — Whether employee suffering detriment — Whether "relevant circumstances" same for UK and foreign employees — Race Relations Act 1976, ss 1(1)(b), 3(4) **Spicer v Government of Spain,** CA [2005] ICR 213

Religion or belief

Less favourable treatment

Support teacher suspended for refusing to comply with instruction not to wear veil in class — Whether less favourable treatment — Appropriate comparator — Whether indirect discrimination — Whether requirement proportionate means of achieving legitimate aim — Employment Equality (Religion or Belief) Regulations 2003, reg 3
Azmi v Kirklees Metropolitan Borough Council, EAT [2007] ICR 1154

Sex

Burden of proof

Burden on complainant to establish facts capable of constituting unlawful discrimination — Burden shifting to employer to prove treatment in no sense on ground of sex — Inferences to be drawn from employer's disregard of code of practice or questionnaire — Whether relevant to equal pay claim — Equal Pay Act 1970, s 1(3) (as substituted by Equal Pay (Amendment) Regulations 1983 (SI 1983/1794), reg 2(2)) — Sex Discrimination Act 1975 (as amended by Race Relations Act 1976, Sch 4, para 1 and Sex Discrimination (Indirect Discrimination and Burden of Proof) Regulations 2001, ss 1(2), 56A(10), 63A, 74(2)
Barton v Investec Henderson Crosthwaite Securities Ltd, EAT [2003] ICR 1205

Burden on complainant to establish prima facie case of less favourable treatment on ground of sex — Burden to show treatment not on ground of sex shifting to respondent once prima facie case established — Sex Discrimination Act 1975, ss 1(1), 63A(2) (as substituted and inserted by Sex Discrimination (Indirect Discrimination and Burden of Proof) Regulations 2001, regs 3, 5)
University of Huddersfield v Wolff, EAT [2004] ICR 828

Employee dismissed because of rumours of relationship with senior colleague — Tribunal finding employers failing to discharge burden of proving treatment "in no sense whatsoever" on ground of sex — Whether correct test — Sex Discrimination Act 1975, s 63A (as inserted by Sex Discrimination (Indirect Discrimination and Burden of Proof) Regulations 2001, reg 5)
Chamberlin v Emokpae, EAT [2004] ICR 1476

Employee made redundant after return from maternity leave — Whether tribunal adopting proper approach to shifting burden of proof — Whether comparison with hypothetical male comparator appropriate — Whether employer under duty to carry out health and safety risk assessment — Sex Discrimination Act 1975, s 63A (as inserted by Sex Discrimination (Indirect Discrimination and Burden of Proof) Regulations 2001, reg 5) — Management of Health and Safety at Work Regulations 1999, reg 16 **Madarassy v Nomura International plc,** CA [2007] ICR 867

Maternity leave: see also *Harrassment*

Teacher on maternity leave not consulted as to class preference for following year — Whether detriment — Teacher given different class to teach on return — Whether returning to same "job" — Sex Discrimination Act 1975, ss 1, 6 — Maternity and Parental Leave etc Regulations 1999, regs 2(1), 18(2)
Blundell v Governing Body of St Andrew's Catholic Primary School, EAT [2007] ICR 1451

Conciliation agreement

Equal pay claims settled following negotiations between employer and trade unions with help of Acas officers — Employees signing COT3 agreements and accepting compensation — Whether agreements valid — Whether subsequent equal pay claims precluded — Sex Discrimination Act 1975, s 77 — Employment Tribunals Act 1996, s 18
Clarke v Redcar and Cleveland Borough Council, EAT [2006] ICR 897

Employment

Compensation

Contract of employment tainted by illegality — Whether employee precluded from claiming compensation for loss of earnings — Sex Discrimination Act 1975, ss (1), 66(1) — Council Directive 76/207/EEC, art 6, art 6 **Hall v Woolston Hall Leisure Ltd,** CA [2001] ICR 99

DISCRIMINATION—*continued*

Sex—*continued*

Employment—continued

Gender reassignment

Employment ceasing due to lack of funding — Member of selection panel for alternative job alleged to be transphobic — Whether transsexual treated less favourably on ground of reassignment — Sex Discrimination Act 1975, s 2A (as inserted by Sex Discrimination (Gender Reassignment) Regulations 1999, reg 2(1))
Baldwin v Brighton and Hove City Council, EAT [2007] ICR 680

Genuine occupational qualification

Transsexual rejected for appointment as police constable on ground of inability to carry out personal searches — Whether exception applicable — Whether constable "liable to be called upon to perform" intimate searches — Whether supplementary genuine occupational qualification — Sex Discrimination Act 1975, ss 7, 7B(2)(a) (as inserted by Sex Discrimination (Gender Reassignment) Regulations 1999, reg 4(1)) — Police and Criminal Evidence Act 1984, s 54(9)
Chief Constable of the West Yorkshire Police v A (No 2), EAT [2002] ICR 552
CA [2003] ICR 161
HL(E) [2004] ICR 806

Less favourable treatment *see also* INDUSTRIAL RELATIONS: **Employment tribunals:** *Striking out proceedings*
Trade union activities: *Action short of dismissal*

Applicant discharged from armed forces on ground of homosexuality — Complaint of discrimination on ground of sex — Whether "sex" including sexual orientation — Appropriate comparator — Sex Discrimination Act 1975, ss 1(1)(a), 5(3) — Human Rights Act 1998, s 3, Sch 1, Pt I, art 14 **Macdonald v Ministry of Defence**,
EAT(Sc) [2001] ICR 1
Ct of Sess [2002] ICR 174
HL(Sc) [2003] ICR 937

Employee undergoing gender reassignment to female sex seeking use of female toilet — Employer arranging use of toilet for disabled persons while applicant at pre-operative stage — Whether unlawful discrimination — Allegation of harassment by fellow employees — Whether employer liable — Sex Discrimination Act 1975, ss 2A, 41(3), 82 (as inserted and amended by Sex Discrimination (Gender Reassignment) Regulations 1999, reg 2(1)(3))
Croft v Royal Mail Group plc (formerly Consignia plc), CA [2003] ICR 1425

Female chief inspector stopped from doing staff appraisals following complaints — Male chief inspectors retaining function — Whether valid comparators — Whether "detriment" — Approach to question of less favourable treatment on ground of sex — Sex Discrimination (Northern Ireland) Order 1976, arts 3(1)(a), 7, 8(2)(b)
Shamoon v Chief Constable of the Royal Ulster Constabulary, HL(NI) [2003] ICR 337

Female prison officer required to search male prisoner — Appropriate comparator — Male prison officers prohibited from searching female prisoners — Whether unlawful discrimination — Sex Discrimination Act 1975, ss 1(1), 5(3) **Home Office v Saunders**,
EAT [2006] ICR 318

Gender reassignment treatment affecting applicant's work performance — Dismissal for capability — Whether less favourable treatment — Gender identity dysphoria — Whether affecting day-to-day activities — Whether disability — Sex Discrimination Act 1975, s 1(1) — Disability Discrimination Act 1995, s 1(1)
Ashton v Chief Constable of West Mercia Constabulary, EAT [2001] ICR 67

Lesbian teacher complaining of pupils' gender-specific abuse — No evidence hypothetical homosexual male would have been treated differently — Whether sex discrimination — Sex Discrimination Act 1975, ss 1(1), 5(3) — Human Rights Act 1998, s 3(1)
Pearce v Governing Body of Mayfield Secondary School, CA [2002] ICR 198
HL(E) [2003] ICR 937

Maternity leave see also *Harrassment*

Bonus based on sales reducing pro-rata where employee absent from work — Whether discriminatory where absence due to maternity leave — Whether bonus "wages or salary" — Sex Discrimination Act 1975, s 6(2)(6) — Employment Rights Act 1996, ss 47C, 71(5)(6) (as inserted and substituted by Employment Relations Act 1999, Sch 4, Pt III, para 8, Pt I) — Maternity and Parental Leave etc Regulations 1999, reg 9(2)(3) (as substituted by Maternity and Parental Leave (Amendment) Regulations 2002, regs 3, 9)
Hoyland v Asda Stores Ltd, EAT(Sc) [2005] ICR 1235

DISCRIMINATION—*continued*
Sex—*continued*
Employment—continued
Police

Constable complaining of less favourable treatment and victimisation in decisions by superiors as to postings — Whether "act done by" chief officer — Whether chief officer liable for discrimination — Sex Discrimination Act 1975, s 17(1)
Chief Constable of Cumbria v McGlennon, EAT [2002] ICR 1156

Constable complaining of sex discrimination by fellow officers — Whether chief constable liable — Sex Discrimination Act 1975, ss 17(1), 41(2) — Council Directive 76/207/EEC, art 1(1) **Chief Constable of Kent County Constabulary v Baskerville,** CA [2003] ICR 1463

Pregnancy

Employee recruited for fixed period failing to inform employer of pregnancy — Dismissal during term of contract when employer informed of pregnancy — Whether contrary to Community law — Whether non-renewal of fixed-term contract dismissal — Whether contrary to Community law in case of pregnant employee — Council Directive 76/207/EEC, arts 2(1), 3(1), 5(1) — Council Directive 92/85/EEC, art 10
Tele Danmark A/S v Handels- og Kontorfunktionærernes Forbund i Danmark (HK) (acting on behalf of Brandt-Nielsen) (Case C-109/00), ECJ [2004] ICR 610
Jiménez Melgar v Ayuntamiento de los Barrios (Case C-438/99), ECJ [2004] ICR 610

Employer's sick-leave scheme — Employees' days of absence for illness offset against quota of days of paid sick leave — Sick pay reduced after absence for half of quota — Employee with pregnancy-related illness treated no differently from employee with any other illness — Whether sex discrimination — EC Treaty, art 141 EC — Council Directive 75/117/EEC
North Western Health Board v McKenna (Case C-191/03), ECJ [2006] ICR 477

Pregnant employee demoted purportedly to avoid health and safety risks — Whether employer failing to avoid risks by adjusting working conditions — Whether employer justified in demoting employee — Whether reducing risk to lowest acceptable level sufficient to satisfy requirement to "avoid" risk — Employment Rights Act 1996, ss 66, 47C (as inserted by employment relations Act 1999, Sch 4, Pt III, para 8) — Management of Health and Safety at Work Regulations 1999, reg 16 **New Southern Railway Ltd v Quinn,** EAT [2006] ICR 761

Vacancy for work in operating theatre for indefinite period — Pregnant woman rejected on ground of national law prohibiting employment of pregnant women in potentially dangerous work — Whether unlawful discrimination — Council Directive 76/207/EEC, art 2 **Mahlburg v Land Mecklenburg-Vorpommern (Case C-207/98),** ECJ [2001] ICR 1032

Provision, criterion or practice

Employers not permitting employee to work part-time on return from maternity leave — Employee dismissed on ground of redundancy — Whether objectively justified — Sex Discrimination Act 1975, s 1(2)(b)(ii) (as substituted by Sex Discrimination (Indirect Discrimination and Burden of Proof) Regulations 2001, reg 3)
Hardy & Hansons plc v Lax, CA [2005] ICR 1565

Requirement or condition

College requiring predominantly female part-time lecturers on fixed-term contracts to be re-engaged as sub-contractors through agency — Applicant losing income and benefits associated with employment — Proper approach to evaluating justification for condition against discriminatory effect on women — Whether discrimination against applicant as contract worker — Whether lecturer employed by college appropriate comparator in equal pay claim — Equal Pay Act 1970, s 1(6) (as amended by Sex Discrimination Act 1975, s 8(6), Sch 1) — Sex Discrimination Act 1975, ss 1(1)(b), 9(2) — EC Treaty, art 141
Allonby v Accrington and Rossendale College, CA [2001] ICR 1189

Employee over 65 at time of dismissal — Application for redundancy payment and complaint of unfair dismissal precluded by domestic legislation — Whether legislation discriminating against men — Onus to show objectively justified — Employment Rights Act 1996, ss 109(1), 156(1) — EC Treaty, art 141 **Harvest Town Circle Ltd v Rutherford,** EAT [2002] ICR 123

Employee over 65 at time of dismissal — Application for redundancy payment and complaint of unfair dismissal precluded by domestic legislation — Whether legislation discriminating against men — Whether objectively justified — Employment Rights Act 1996, ss 109(1)(b), 156(1)(b) — EC Treaty, art 141 — Council Directive 97/80/EC, art 2
Secretary of State for Trade and Industry v Rutherford (No 2),
EAT and CA [2005] ICR 119
HL(E) [2006] ICR 785

DISCRIMINATION—*continued*
Sex—*continued*
Employment—continued
Requirement or condition—*continued*

Employee working under series of fixed term contracts — Employers' need for redundancies — Policy of non renewal of fixed term contracts before applying redundancy selection procedure — Whether indirect discrimination — Whether requirement shown to be justified — Sex Discrimination Act 1975, s 1(1)(b) **Whiffen v Milham Ford Girls' School,** CA [2001] ICR 1023

Equally qualified man and woman applying for promotion — Priority given to woman where under-represented unless balance tilted in favour of man by reasons specific to him — Whether contrary to equal treatment principle — Whether within exception for measures to promote equal opportunity — Council Directive 76/207/EEC, art 2(1)(4)
Marschall v Land Nordrhein-Westfalen (Case C-409/95), ECJ [2001] ICR 45

Lord Chancellor appointing special adviser — Post not advertised and applications not sought — Whether indirect discrimination — Sex Discrimination Act 1975, s 1(1)(a) — Race Relations Act 1976, s 1(1)(b) **Lord Chancellor v Coker,** EAT [2001] ICR 507
CA [2002] ICR 321

Positive discrimination in favour of under-represented sex — Candidate belonging to under-represented sex to be selected for post unless breach of requirement of objectivity — Whether contrary to Community law — EC Treaty, art 141 EC — Council Directive 76/207/EEC, art 2(1)(4) **Abrahamsson v Fogelqvist (Case C-407/98),** ECJ [2002] ICR 932

Treatment on ground of applicant's homosexuality — Complaint of discrimination on ground of sex — Whether sex including sexual orientation — Appropriate comparator — Sex Discrimination Act 1975, ss 1(1)(a), 5(3)
Macdonald v Ministry of Defence, HL(Sc) [2003] ICR 937
Pearce v Governing Body of Mayfield Secondary School, HL(E) [2003] ICR 937

Equal pay see also *Burden of proof*
Employment: Requirement or condition
TRUSTS: **Pension scheme**

Comparison of pay

Midwives receiving lower basic monthly salary than clinical technicians — Inconvenient hours supplement paid to midwives but not technicians — Midwives working fewer weekly hours than technicians — Whether pay comparison to take account of supplement and reduced hours — EC Treaty, art 119 — Council Directive 75/117/EEC
Jämställdhetsombudsmannen v Örebro Läns Landsting (Case C-236/98), ECJ [2001] ICR 249

Damages

Claims for non-economic loss — Whether recoverable — Employees changing jobs with same employer over 6 months before complaints — Whether "stable employment" relationship — Whether change in "employment" for purposes of qualifying date — Equal Pay Act 1970, ss 2(1)(4) (as substituted by Sex Discrimination Act 1975, s 8(6), Sch 1, Pt 1, para 2), 2ZA(2)(3) (as inserted by Equal Pay Act 1970 (Amendment) Regulations 2003, reg 4) — Sex Discrimination Act 1975, s 6(6) **Newcastle upon Tyne City Council v Allan,** EAT [2005] ICR 1170

Indirect discrimination

Comparators paid more than claimants — Large majority of males in both advantaged and disadvantaged groups — Percentage of women in disadvantaged group small — Whether prima facie case of indirect discrimination to be inferred — Whether disadvantaged group restricted to those engaged in like work with comparators — Whether non-discriminatory agreement creating pay disparity providing objective justification — Equal Pay Act 1970, s 1 (as substituted by Sex Discrimination Act 1975, s 8(1) and Equal Pay (Amendment) Regulations 1983, reg 2(2))
Tyne and Wear Passenger Transport Executive (trading as Nexus) v Best, EAT [2007] ICR 523

Comparators better paid than claimants — Sexes equally represented in claimants' group — Statistics based on pool of employees in claimants' and comparators' groups showing women much more likely to be disadvantaged group — Whether establishing prima facie case of indirect discrimination — Equal Pay Act 1970, s 1 (as substituted by Sex Discrimination Act 1975, s 8(1) and Equal Pay (Amendment) Regulations 1983, reg 2(2))
Home Office v Bailey, CA [2005] ICR 1057

DISCRIMINATION—*continued*
Sex—*continued*
Equal pay—continued
Indirect discrimination—*continued*

Hospital domestic staff claiming payment of bonus received by porters and caterers — Whether entitled to choose porters as comparators — Whether comparator group to include all employees receiving bonus — Whether comparator group too small to permit statistically significant conclusion **Cheshire and Wirral Partners NHS Trust v Abbott,** CA [2006] ICR 1267

Maternity leave

Lump sum payment to employees on maternity leave to compensate for occupational disadvantages of maternity leave — Whether payment to female employees only discriminatory — EC Treaty, art 119
Abdoulaye v Régie Nationale des Usines Renault SA (Case C-218/98), ECJ [2001] ICR 527

Maternity pay based on earnings during specified period — Pay rise awarded after specified period — Whether contrary to Community equal pay principle to exclude pay rise in calculating maternity pay — Whether domestic legislation providing effective remedy — Equal Pay Act 1970, s 1(1)(2) (as amended by Sex Discrimination Act 1975, s 8) — Employment Rights Act 1996, s 13 — Statutory Maternity Pay (General) Regulations 1986, reg 21(7) (as inserted by Statutory Maternity (General) Amendment Regulations 1996, reg 2) — EC Treaty, art 119 **Alabaster v Barclays Bank plc (formerly Woolwich plc),** CA [2005] ICR 1246

Maternity pay based on earnings during specified period — Whether earnings to include pay rise awarded after specified period — Whether relevant that pay rise not backdated — EC Treaty, art 119 **Alabaster v Woolwich plc** (Case C-147/02), ECJ [2005] ICR 695

Pension scheme

Claimants employed under series of part-time contracts transferring to permanent full-time contracts — Whether continuation of stable employment relationship — Whether applications more than six months later to include part-time employment in pension entitlement out of time — Equal Pay Act 1970, s 2(4)
Jeffery v Secretary of State for Education, EAT [2006] ICR 1062

Female nurses retiring at 55 entitled to pension calculated on full pensionable service — Calculation of male nurses' pensions restricted to service after May 1990 — Whether restriction discriminatory — National Health Service Pension Scheme Regulations 1995, reg R2(4) — EC Treaty, art 119 **Quirk v Burton Hospitals NHS Trust,**
EAT [2001] ICR 415
CA [2002] ICR 602

Part-time employees' retrospective claims — Part-time employees excluded from or having option to join scheme compulsory for full-time employees — Effect of transfer of undertaking on time for bringing claim — Whether time running from end of last contract — Equal Pay Act 1970, s 2(4) (as amended by Sex Discrimination Act 1975, s 8(6), Sch 1, Pt I, para 2) — Transfer of Undertakings (Protection of Employment) Regulations 1981, regs 5, 7
Preston v Wolverhampton Healthcare NHS Trust (No 3), CA [2005] ICR 222

Part-time employees' retrospective claims — Part-time employees excluded from having option to join scheme compulsory for full-time employees — Effect of transfer of undertaking on time for bringing claim — Whether time running from end of employment with transferee — Equal Pay Act 1970, s 2(4) (as amended by Sex Discrimination Act 1975, s 8(6), Sch 1, Pt I, para 2) — Transfer of Undertakings (Protection of Employment) Regulations 1981, reg 5
Preston v Wolverhampton Healthcare NHS Trust (No 3), HL(E) [2006] ICR 606

Part-time employees' retrospective claims — Part-time employees excluded from or having option to join scheme compulsory for full-time employees — Whether breach of equality clause — Effect of failure to inform part-time employees of removal of barrier to membership — When series of contracts ceasing to be stable employment relationship — Effect of transfer of undertaking on time for bringing claim — Equal Pay Act 1970, ss 1(1)(2) (as substituted by Sex Discrimination Act 1975, s 8(6), Sch 1, Pt I, para 2 and modified by Occupational Pension Schemes (Equal Access to Membership) Regulations 1976, reg 12(1)), 2(4) — Transfer of Undertakings (Protection of Employment) Regulations 1981, regs 5, 7
Preston v Wolverhampton Healthcare NHS Trust (No 3),
EAT [2004] ICR 993

DISCRIMINATION—*continued*

Sex—*continued*

Equal pay—continued

Pension scheme—*continued*

Part-time employees' retrospective claims time-barred and restricted by national legislation — Whether legislation compatible with Community law — Successive contracts of employment with same employer within stable employment relationship — Whether six-month limitation period running from end of last contract — Equal Pay Act 1970, s 2(4)(5) (as amended by Sex Discrimination Act 1975, s 8(6), Sch 1, Pt I, para 2) — Occupational Pension Schemes (Equal Access to Membership) Regulations 1976, reg 12(1)(b) — EC Treaty, art 119 **Preston v Wolverhampton Healthcare NHS Trust (No 2),** HL(E) [2001] ICR 217

Pension scheme providing for surviving spouse — Female member with partner male by gender reassignment — National legislation precluding marriage — Partner not entitled to widower's pension under scheme — Whether contrary to Community equal pay principle — EC Treaty, art 141 EC — Convention for the Protection of Human Rights and Fundamental Freedoms, art 12 **KB v National Health Service Pensions Agency (Case C-117/01),** ECJ [2004] ICR 781

Scheme rules containing power to amend retrospectively — Trustee amending scheme to equalise male and female retirement ages by raising female retirement age retrospectively — Whether amendment effective under Community law — EC Treaty, art 141 EC **Harland & Wolff Pension Trustees Ltd v Aon Consulting Financial Services Ltd,** Warren J [2007] ICR 429

Same employment

Applicants performing work of equal value to workers of different sex employed by previous employer — Whether those workers relevant comparators on claim for equality of pay — Whether applicants able to rely on Community equal pay provision — EC Treaty, art 141(1) EC **Lawrence v Regent Office Care Ltd (Case C-320/00),** ECJ [2003] ICR 1092

Head teacher employed by education authority — Pay scales settled by statutory committee for entire public sector in Scotland — Whether head teacher employed by different education authority relevant comparator — Equal Pay Act 1970, s 1(6) (as amended by Sex Discrimination Act 1975, s 8(1), Sch 1) — EC Treaty, art 141 EC **South Ayrshire Council v Morton,** Ct of Sess [2002] ICR 956

Male civil servants seeking equality of pay with female employees in different government department — Whether common employer sufficient basis for comparison — Whether single source having responsibility for pay levels — Whether female employees relevant comparators — Equal Pay Act 1970, s 1 (as substituted by Sex Discrimination Act 1975, s 8(1)(6), Sch 1, Pt I) — EC Treaty, art 141(1) EC **Department for Environment Food and Rural Affairs v Robertson,** CA [2005] ICR 750

Male civil servants seeking equality of pay with female employees in different government department — Whether in "same employment" — Whether female employees relevant comparators — Whether job evaluation study rating comparator's work as equivalent — Equal Pay Act 1970, s 1 (as substituted by Sex Discrimination Act 1975, s 8(1)(6), Sch 1, Pt I) — EC Treaty, art 141(1) EC **Department for Environment Food and Rural Affairs v Robertson,** EAT [2004] ICR 1289

School support staff employed by council pursuant to recommendation of governing body — Male comparators on same grade of collective agreement employed by council at other establishments — Whether in same employment — Whether having common terms and conditions — Equal Pay Act 1970, s 1(6) (as amended by Sex Discrimination Act 1975, Sch 1, Pt I, para 1(1)) — School Staffing (England) Regulations 2003, regs 11(1), 15(3)(4) **South Tyneside Metropolitan Borough Council v Anderson,** CA [2007] ICR 1581

Woman employed by college dismissed and re-engaged as self-employed through agency on less favourable terms — Claim to equal pay with male employee at college and to access to teachers' pension — Pension only available to employed persons under statutory rules — Whether college employee relevant comparator — Whether comparator necessary for pension claim based on statutory discrimination — Whether statutory pension condition defeasible by evidence of indirect discrimination — Whether self-employed person "worker" for purposes of Community equal pay provision — EC Treaty, art 141 EC **Allonby v Accrington and Rossendale College (Case C-256/01),** ECJ [2004] ICR 1328

DISCRIMINATION—*continued*

Sex—*continued*

Equal pay—continued

Time limit *see also* Damages

Employee working in different departments during employment — Claim for equality of pay with comparators in department employee not working in during last six months of employment — Whether employee "employed in the employment" during final six months — Equal Pay Act 1970, s 2(4) (as amended by Sex Discrimination Act 1975, s 8(6), Sch 1, Pt I) **Young v National Power plc,** CA [2001] ICR 328

Variation due to material difference

Applicant paid less than female employed on like work — Difference not due to sex discrimination — Whether onus on employer objectively to justify difference in pay — Equal Pay Act 1970, s 1(3) (as substituted by Equal Pay (Amendment) Regulations 1983, reg 2(2)) **Parliamentary Comr for Admininstration and the Health Service Comrs v Fernandez,** EAT [2004] ICR 123

Applicant paid less than male comparators — Length of service reason for differential — Reason having disparate impact on women — Whether employer having to show objective justification for use of length of service — Whether differential justified — Equal Pay Act 1970, s 1(3) (as substituted by Equal Pay (Amendment) Regulations 1983, reg 2(2)) **Health and Safety Executive v Cadman,** EAT [2004] ICR 378
CA [2005] ICR 1546

Claimant paid less than male comparator for work of equal value — Whether onus on employer objectively to justify difference in pay — Equal Pay Act 1970, s 1(3) (as substituted by Equal Pay (Amendment) Regulations 1983, reg 2(2)) **Sharp v Caledonia Group Services Ltd,** EAT [2006] ICR 218

Comparator's pay protected following transfer of undertaking — Applicant producing statistics based on pool of 8 to show smaller percentage of women than men entitled to such protection — Whether any onus on employer to prove absence of sex discrimination — Equal Pay Act 1970, s 1(3) (as substituted by Equal Pay (Amendment) Regulations 1983, reg 2(2)) **Nelson v Carillon Services Ltd,** CA [2003] ICR 1256

Council employees claiming equality of pay with male comparators — Subsequent evaluation scheme covering all employees incorporating pay protection — Whether pay protection to be extended retrospectively to claimants establishing entitlement to higher pay — Whether difference in pay due to non-discriminatory collective bargaining — Equal Pay Act 1970, s 1(3) (as substituted by Equal Pay (Amendment) Regulations 1983, reg 2(2)) **Middlesbrough Borough Council v Surtees,** EAT [2007] ICR 1644

Criterion of length of service used by employer in setting pay — Criterion having adverse impact on female employees — Whether employer needing to show specific justification — Equal Pay Act 1970, s 1(3) (as substituted by Equal Pay Act (Amendment) Regulations 1983, reg 2(2)) — EC Treaty, art 141 EC **Cadman v Health and Safety Executive (Equal Opportunities Commission intervening)** (Case C-17/05), ECJ [2006] ICR 1623

Employee claiming bonus payments lower than those of male comparators — Employer satisfying tribunal disparity not on ground of sex — No case of indirect discrimination — Whether employer obliged to provide objective justification — Claim of victimisation in relation to dismissal — Tribunal finding victimisation not significant influence — Whether correct test applied **Villalba v Merrill Lynch & Co Inc,** EAT [2007] ICR 469

Equal treatment

Pension

Refusal of pension to male-to-female transsexual on ground of not having attained male pensionable age — Whether unlawful discrimination — Council Directive 79/7/EEC, art 4(1) **Richards v Secretary of State for Work and Pensions (Case C-423/04),** ECJ [2006] ICR 1181

Harassment

National legislation precluding unwanted conduct "on the ground of" sex — Community law precluding conduct "related to" sex — Whether causative requirement in national legislation non-compliant — Whether objective test appropriate — Requirement for comparator in discrimination claims on grounds of pregnancy and maternity leave — Whether impermissible — Restrictions on right to claim discrimination during maternity leave — Whether regressive — Sex Discrimination Act 1975, ss 3A, 4A, 6A (as inserted by Employment Equality (Sex Discrimination) Regulations 2005, regs 4, 5, 8) — Council Directive 76/207/EEC, art 2(2) (as substituted by Parliament and Council Directive 2002/73/EC, art 1) **R (Equal Opportunities Commission) v Secretary of State for Trade and Industry,** Burton J [2007] ICR 1234

DISCRIMINATION—*continued*

Sex—*continued*

Sexual orientation

Occupational requirements — Community Directive providing derogation from prohibition on discrimination on ground of sexual orientation for occupational requirements — Whether transposing legislation compatible with derogation — Employment Equality (Sexual Orientation) Regulations 2003, regs 7(2)(3), 20(3), 25 — Council Directive 2000/78/EC, art 4
R (Amicus—MSF Section) v Sec of State for Trade and Industry (Christian Action Research Education intervening), Richards J [2007] ICR 1176

Vocational training

Pregnancy

Trainee midwives receiving bursaries — Payments terminated during maternity absence — Whether unlawful discrimination — Sex Discrimination Act 1975, s 14 (as substituted by Employment Act 1989, s 7(1)) — Council Directive 76/207/EEC, art 5
Fletcher v NHS Pensions Agency, EAT [2005] ICR 1458

Time limit

Extension of time

Complaint brought more than three months after act of discrimination — Complainant awaiting outcome of internal grievance procedure — Whether sufficient ground for extending time — Whether complainant estopped from pursuing late claims which could have been brought in earlier proceedings — Race Relations Act 1976, s 68(6)
Apelogun-Gabriels v Lambeth London Borough Council, CA [2002] ICR 713

Complaint presented nine years after act complained of — Employee suspecting discrimination in relation to appointment when inspecting file in connection with complaint of subsequent discrimination — Whether just and equitable to extend time — Race Relations Act 1976, s 68
Southwark London Borough Council v Afolabi, CA [2003] ICR 800

Time when act committed

Police constable complaining of failure to deal with numerous acts of discrimination by fellow officers over 11 years — Complaint presented after constable absent on sick leave for one year — Whether ongoing discriminatory treatment of ethnic policewomen "act extending over a period" — Sex Discrimination Act 1975, s 76(6)(b) — Race Relations Act 1976, s 68(7)(b)
Comr of Police of the Metropolis v Hendricks, CA [2003] ICR 530

Transfer of undertaking

Whether relevant transfer

Service user undertaking provision of services on insolvency of provider — No identifiable economic entity for provision of services to user prior to transfer — Whether relevant transfer — Whether transfer precluded by insolvency of transferor — European Communities Act 1972, s 2(2) — Transfer of Undertakings (Protection of Employment) Regulations 1981, reg 3
Transport and General Workers' Union v Swissport (UK) Ltd, EAT [2007] ICR 1593

Victimisation

Collective agreement

Employers requiring firefighters to respond to medical emergencies in place of ambulance crews — No specific reference to such duties in collective agreement — Whether part of firefighters' duty to treat casualties — Whether employers able to require firefighters to undertake duties
Bull v Nottinghamshire and City of Nottingham Fire and Rescue Authority, CA [2007] ICR 1631

Race

Employer's policy to allow employees short leave of absence without inquiry — Employee seeking time off to consult adviser prior to hearing of race complaint against employer — Time off refused — Employee dismissed for taking time off without permission — Whether less favourable treatment — Race Relations Act 1976, s 2(1)(a)
Brown v TNT Express Worldwide (UK) Ltd, CA [2001] ICR 182

Sex see **Sex:** *Equal pay:* Variation due to material difference

EDUCATION

Teacher

Disciplinary proceedings

Allegation of inappropriate conduct towards pupil — Disciplinary panel of governors deliberating in private after hearing evidence — Whether chief education officer entitled to attend panel's deliberations — Whether officer's exclusion invalidating panel's finding — Whether appropriate for chief education officer to tender advice to panel in teacher's absence — Education Reform Act 1988, Sch 3, para 8(1)(9) — Education Act 1996, ss 496, 497
R (McNally) v Secretary of State for Education and Employment, CA [2002] ICR 15

EDUCATION—*continued*

Teacher—*continued*

Discrimination

Teacher with congenital heart disorder having child by surrogate — Paid post-natal leave refused on financial grounds — Complaint of disability discrimination — Whether governing body or local education authority correct respondent — Whether any breach of duty — Disability Discrimination Act 1995, s 5(1)(2) — School Standards and Framework Act 1998, Sch 16, para 22 — Education (Modification of Enactments Relating to Employment) Order 1999, art 3(1) **Murphy v Slough Borough Council,** CA [2005] ICR 721

Teacher with congenital heart disorder having child by surrogate — Paid post-natal leave refused on financial grounds — Complaint of disability discrimination — Whether governing body or local education authority correct respondent — Whether refusal less favourable treatment for reason related to disability — Whether treatment justified — Disability Discrimination Act 1995, s 5(1)(2) — School Standards and Framework Act 1998, Sch 16, para 22 — Education (Modification of Enactments Relating to Employment) Order 1999, arts 2(2), 6
Murphy v Slough Borough Council, EAT [2004] ICR 1163

Dismissal

Teacher claiming constructively dismissed — Whether governing body and/or local education authority correct respondents to complaint of unfair dismissal — School Standards and Framework Act 1998, Sch 16, para 25 — Education (Modification of Enactments Relating to Employment) Order 1999, arts 2(2), 3(1), 6
Green v Governing Body of Victoria Road Primary School, EAT [2003] ICR 713
CA [2004] ICR 684

EMPLOYMENT

Breach of contract

Jurisdiction see also **Unfair dismissal:** *Excluded classes*

Indian national living in England contracting to work for Indian company in India — Contract governed by Indian law — Company sending employee to work in England after nine months in India — Further contract containing meaningless governing law clause — Complaints of unlawful deductions and breach of contract — Whether employment tribunal jurisdiction — Contracts (Applicable Law) Act 1990, Sch 1, art 4(1) — Employment Rights Act 1996, s 204 — Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994, art 3
Shekar v Satyam Computer Services Ltd, Employment Tribunal [2005] ICR 737

Termination agreement

Agreement concluded after termination of employment — Whether employment tribunal having jurisdiction — Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994, art 3 **Miller Bros & F P Butler Ltd v Johnston,** EAT [2002] ICR 744

Continuous employment

Temporary cessation of work

Teacher engaged as home tutor for individual children — Obligation to fulfil commitment to particular pupil — Engagements of varying duration and sometimes overlapping — Whether contracts of service — Whether periods between engagements "temporary cessation of work" — Whether continuously employed — Employment Rights Act 1996, s 212(3)
Cornwall County Council v Prater, CA [2006] ICR 731

Contract of employment

Agency worker

Applicant supplied by agency working for five years at local authority hostel — Whether employed by agency — Whether circumstances giving rise to implied contract of service between applicant and local authority **Dacas v Brook Street Bureau (UK) Ltd,**
CA [2004] ICR 1437

Applicant working for 5 years for client of employment agency — Whether contract of employment with client to be implied — Whether applicant "employee" — Employment Rights Act 1996, s 230(1) **Franks v Reuters Ltd,** CA [2003] ICR 1166

Applicant working part-time on one long-term assignment — Assignment terminated after 2½ years — Complaint of unfair dismissal — Whether applicant "employee" of agency
Montgomery v Johnson Underwood Ltd, CA [2001] ICR 819

Claimant under contract of service with agency supplying services to company — Claim of unfair dismissal against company — Whether contract of service with company to be implied
Cairns v Visteon UK Ltd, EAT [2007] ICR 616

Former employee supplying services through agency — Agency agreement stating no contract of employment with agency or end-user — Whether contract of employment with end-user to be implied — Employment Rights Act 1996, s 230(2)
James v Greenwich London Borough Council, EAT [2007] ICR 577

EMPLOYMENT—*continued*

Contract of employment—*continued*

Agency worker—continued

Former employee supplying services through agency — No change in working arrangements other than payment of invoices by agency — Whether contract of service with employer to be implied **Cable & Wireless plc v Muscat,** CA [2006] ICR 975

Worker supplied by agency to company — Whether contract of service with company — Subsequent permanent employment with company — Whether worker able to rely on supply period to establish requisite period of employment for unfair dismissal complaint **Stephenson v Delphi Diesel Systems Ltd,** EAT [2003] ICR 471

Apprentice

Apprentice engaged under standard form "modern apprenticeship pact" — Employer agreeing to employ and apprentice agreeing to comply with employer's terms and conditions of employment "for the duration of the training plan" — Whether agreement terminable by notice in accordance with employer's terms and conditions before completion of training **Whitely v Marton Electrical Ltd,** EAT [2003] ICR 495

Modern apprenticeship agreement — Whether breach by employer giving rise to damages for loss of training — Appropriate notice of termination **Flett v Matheson,** EAT [2005] ICR 1134
CA [2006] ICR 673

Modern apprenticeship agreement — Whether contract of employment **Thorpe v Dul,** EAT [2003] ICR 1556

Bonus scheme

Employees promised scheme to replace group percentage profit share scheme on acquisition of employer company — New scheme dependent on performance against growth targets — No payments made when targets not met — Employees' claims of unlawful deduction of wages — Whether any loss unlawful deduction or unliquidated claim for damages for breach of contract — Whether tribunal having jurisdiction to entertain claims — Employment Rights Act 1996, s 13 **Coors Brewers Ltd v Adcock,** CA [2007] ICR 983

Breach of contract

Bonus payable in anticipation of future loyalty — Whether employer obliged to exercise discretion as to payment of bonus — Whether employee entitled to fair and rational bonus assessment — Assessment of bonus following wrongful dismissal **Horkulak v Cantor Fitzgerald International,** CA [2005] ICR 402

Bonus payable under discretionary scheme unless employee not in employment at payment date — Claim for failure to award more substantial bonus and to make any award for year of dismissal — Whether exercise of discretion irrational — Whether employee "consumer" — Whether term for remuneration to be reasonable — Unfair Contract Terms Act 1977, s 3 **Keen v Commerzbank AG,** CA [2007] ICR 623

Church minister

Associate minister of Church of Scotland — Complaint of sex discrimination in relation to disciplinary proceedings — Whether minister's relationship with church "employment" — Whether complaint "matters spiritual" within church's exclusive jurisdiction — Whether employment tribunal jurisdiction — Church of Scotland Act 1921, s 3, Sch, art IV — Sex Discrimination Act 1975, s 82(1) **Percy v Board of National Mission of the Church of Scotland,** HL(Sc) [2006] ICR 134

Collective agreement

Employers negotiating revised terms with union — No ballot of employees — Union informing employers majority of 1,500 employees consenting to revised terms — Petition objecting to new terms by 130 employees continuing to work under protest — Proceedings issued by 61 employees two years later — Whether bound by agreement **Henry v London General Transport Services Ltd,** CA [2002] ICR 910

Employers requiring firefighters to respond to medical emergencies in place of ambulance crews — No specific reference to such duties in collective agreement — Whether part of firefighters' duty to treat casualties — Whether employers able to require firefighters to undertake duties **Bull v Nottinghamshire and City of Nottingham Fire and Rescue Authority,** CA [2007] ICR 1631

Provision in collective agreement relied on by employee as precluding compulsory redundancy — Whether intended or apt to be incorporated as term of employee's contract of employment **Kaur v MG Rover Ltd,** CA [2005] ICR 625

EMPLOYMENT—*continued*
Contract of employment—*continued*
Company director
Controlling shareholder having service contract with company — Whether "employee" for purpose of unfair dismissal claim — Employment Rights Act 1996, s 230(1)
Connolly v Sellers Arenascene Ltd, CA [2001] ICR 760

Insolvency of company — Director with 50% shareholding applying for money owed — Whether "employee" — Employment Rights Act 1996, ss 182, 230(1)
Gladwell v Secretary of State for Trade and Industry, EAT [2007] ICR 264

Disciplinary proceedings
Different procedures for personal and professional conduct — Whether for employer to decide category of conduct — Whether reasonableness of decision relevant
Saeed v Royal Wolverhampton Hospitals NHS Trust, CA [2001] ICR 903

Employer local authority — Disciplinary proceedings against employees concerning death of child — Statutory inquiry into death pending — Employer refusing to adjourn proceedings until after inquiry — Whether refusal susceptible to judicial review — Risk of proceedings affecting employees' health and preventing participation in inquiry — Whether employer in breach of implied duty of trust and confidence — Whether disciplinary proceedings to be adjourned **R (Arthurworrey) v Haringey London Borough Council,**
Jackson J [2002] ICR 279

Medical practitioner deliberately misleading patient as to problems occurring during operation — Whether personal or professional conduct — Professional conduct to be dealt with by external panel with medical expertise — Practitioner dismissed following internal disciplinary and appeal proceedings — Whether appropriate procedure
Skidmore v Dartford and Gravesham NHS Trust,
EAT [2001] ICR 911
CA [2002] ICR 403
HL(E) [2003] ICR 721

Fiduciary duty
Salaried director attempting to divert company's business to own company summarily dismissed — Salary paid monthly in arrears — Whether director under duty to disclose own misconduct to company — Whether entitled to proportion of salary up to mid-month date of dismissal — Apportionment Act 1870, s 2 **Item Software (UK) Ltd v Fassihi,** CA [2005] ICR 450

Frustration
Surgeon placed on leave while conduct referred to clinical assessment authority — Authority recommending re-skilling placement followed by return to work — Trust claiming contract frustrated after 2 years — Whether realistic possibility of surgeon returning to work — Whether surgeon's contractual obligations capable of performance — Whether contract frustrated — Whether injunctive relief to enforce contract appropriate
Gryf-Lowczowski v Hinchingbrooke Healthcare NHS Trust, Gray J [2006] ICR 425

General practitioner
Practitioner providing services to health authority — Terms of service governed by statutory regulations — Whether "employee" for purpose of unfair dismissal claim — Whether in "employment" or "contract worker" for purpose of race discrimination claim — Race Relations Act 1976, ss 7, 78 — Employment Rights Act 1996, s 230(1)
North Essex Health Authority v David-John, EAT [2004] ICR 112

Illegality
Employer failing to deduct tax and national insurance — Employee having limited knowledge of English language and tax provisions — Whether participating in illegal performance of contract of employment — Whether precluded from pursuing claim for unfair dismissal
Wheeler v Quality Deep Ltd (trading as Thai Royale Restaurant), CA [2005] ICR 265

Payments of sales commission made so as to minimise tax — Complaint of unfair dismissal and claim for payment of commission — Whether burden on employer of establishing contract tainted with illegality — Whether contract enforceable **Colen v Cebrian (UK) Ltd,**
CA [2004] ICR 568

Implied term
Employee alleging campaign by employer to demoralise before dismissing — Compensation awarded for unfair dismissal — Subsequent claim for damages for stress-related illness caused by employer's conduct prior to dismissal — Whether claim sustainable
Eastwood v Magnox Electric plc (Note), CA [2003] ICR 520

EMPLOYMENT—*continued*

Contract of employment—*continued*

Implied term—continued

Employee prior to dismissal subjected to conduct by employer in breach of duty to act fairly — Compensation awarded for unfair dismissal — Subsequent claim for damages in relation to illness caused by employer's conduct prior to dismissal — Whether claim sustainable
Eastwood v Magnox Electric plc, HL(E) [2004] ICR 1064
McCabe v Cornwall County Council, HL(E) [2004] ICR 1064

Employee suspended for three years before dismissal — Compensation awarded for unfair dismissal — Subsequent claim for damages for psychiatric injury caused by suspension — Whether claim to be struck out **McCabe v Cornwall County Council,** CA [2003] ICR 501

Employer in liquidation reputed to have acted fraudulently — Redundant employees proving in liquidation for compensation for loss of employment prospects — Whether employer's breach of implied obligation of good faith cause of employees' failure to obtain further employment — Whether employees entitled to stigma damages
Bank of Credit and Commerce International SA v Ali (No 2), CA [2002] ICR 1258

Employer intending to dismiss employee by reason of redundancy — Employer dismissing employee for other reason — Employee thereby deprived of contractual redundancy benefits — Whether implied term prohibiting dismissal for any reason other than redundancy
Jenvey v Australian Broadcasting Corpn, Elias J [2003] ICR 79

Employer offering enhanced redundancy scheme for incorporation in contracts of permanent employees — Applicant not granted offer in mistaken belief temporary employee — Whether breach of implied term of trust and confidence **Transco plc v O'Brien,** CA [2002] ICR 721

Redundant employees entering into agreement settling all claims arising from employment — Employer subsequently found to have conducted business illegally and dishonestly — Employees claiming stigma damages for breach of implied term of trust and confidence and misrepresentation — Whether claims barred by agreement
Bank of Credit and Commerce International SA v Ali, HL(E) [2001] ICR 337

Senior manager on high earnings — Campaign of bullying and intimidation by chief executive using foul and abusive language — Whether employer in breach of implied term of trust and confidence **Horkulak v Cantor Fitzgerald International,** Newman J [2004] ICR 697

Incidents of contract

Teacher employed at specific centre ceasing to work following dispute with head — Independent report rejecting majority of teacher's complaints and recommending plan for return — Teacher refusing to accept report's conclusions — Employer requiring teacher to accept report before returning to centre — Whether term to be implied entitling employer to require employee to work elsewhere — Whether employer obliged to continue paying teacher
Luke v Stoke-on-Trent City Council, CA [2007] ICR 1678

Office holder

Registrar of births, marriages and deaths — Office of registrar held during pleasure of Registrar General — Registrar appointed and paid by local authority — Whether employee of local authority — Registration Service Act 1953, s 6(4) — Employment Rights Act 1996, s 230(1)
Lincolnshire County Council v Hopper, EAT [2002] ICR 1301

Part-time worker

Contract for work when offered with no fixed working time or salary and worker entitled to refuse work — National legislation laying down general maxima for working time but no particular maxima for part-time workers — Whether employee within scope of Community provisions on equal treatment and part-time work — Whether national legislation or contract precluded by Community provisions — Whether full-time employees of same employer relevant comparators — Council Directive 76/207/EEC, arts 2(1), 5(1) — Council Directive 97/81/EC, Annex, clause 4 **Wippel v Peek & Cloppenburg GmbH & Co KG (Case C-313/02),** ECJ [2005] ICR 1604

Retained fire fighters claiming less favourable treatment than whole-time fire fighters — Whether same type of contract — Whether engaged in same or broadly similar work — Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000, reg 2(3)(4), 5 — Council Directive 97/81/EC, Annex, clause 3(2)
Matthews v Kent and Medway Towns Fire Authority, EAT [2004] ICR 257
CA [2005] ICR 84
HL(E) [2006] ICR 365

Repudiation see *Implied term; Termination*

Council employee resigning following abuse from councillor — Whether repudiatory conduct attributable to council **Moores v Bude-Stratton Town Council,** EAT [2001] ICR 271

EMPLOYMENT—*continued*

Contract of employment—*continued*

Service of, or for services see **Continuous employment:** *Temporary cessation of work*

Share option

Employee granted share options under company scheme — Directors' absolute discretion to determine appropriate proportion employee permitted to exercise — Employee on dismissal not permitted to exercise any options — Whether discretion exercised reasonably
Mallone v BPB Industries Ltd, CA [2002] ICR 1045

Sick pay benefit scheme

Employer's scheme providing benefit as long as employee "unable to work" — Insurers under supporting insurance policy discontinuing cover when satisfied employee not disabled from every employment activity — Whether entitlement to benefit independent of insurance — Whether employee "unable to work" **Jowitt v Pioneer Technology (UK) Ltd,** CA [2003] ICR 1120

Statutory restriction

Local authority employee — Contractual entitlement to gratuity on retirement — Whether term on which employee "holds office" — Subsequent legislation restricting maximum retirement gratuity payable by local authority — Whether contractual term rendered unenforceable — Local Government Act 1972, s 112(2) — Local Government (Discretionary Payments) Regulations 1996, reg 41(3) **Nicholls v Greenwich London Borough Council,** CA [2003] ICR 1020

Termination

Agreement extending employment on redundancy to enable employee to claim enhanced pension benefits — Agreement ultra vires local authority employer — Whether irrational and unlawful to award enhanced benefits — Local Government (Early Termination of Employment) (Discretionary Compensation) (England and Wales) Regulations 2000, reg 8
R (Foster) v Eastbourne Borough Council, CA [2004] ICR 1149

Contract terminable on six months' notice giving employer option to make payment in lieu — Employee summarily dismissed without cause or payment in lieu — Whether entitled to six months' salary in lieu — Whether earnings during notice period to be deducted from award
Cerberus Software Ltd v Rowley, CA [2001] ICR 376

Disappearance of employee's position — Agreement for employee to continue working for employer on different basis for further year — Agreement subsequently found to be ultra vires employer — Whether employment relationship continuing — Date of termination
Eastbourne Borough Council v Foster, CA [2002] ICR 234

Employee accepting early retirement as effective from earlier date — Whether agreed date "effective date of termination" — Employment Rights Act 1996, ss 97(1)(b), 203(1)
Fitzgerald v University of Kent at Canterbury, CA [2004] ICR 737

Employee not returning to work after demotion — Employer stating failure to return by stated date to be taken as resignation — Whether dismissal with notice — Employee presenting unfair dismissal complaint prior to stated date — Whether complaint in time — Employee claiming repudiatory conduct by employer — Whether acceptance by employee by conduct or by presentation of complaint — Employment Rights Act 1996, s 111(3)
Rai v Somerfield Stores Ltd, EAT [2004] ICR 656

Employee's contract terminated after protracted unpaid sick leave — Claim for statutory entitlement to pay during notice period — Contractual notice period one week more than statutory minimum — Whether constituting failure to give statutory notice — Whether claim precluded — Employment Rights Act 1996, ss 86(1), 87(1)(4), 88(1), 91(5)
The Scotts Co (UK) Ltd v Budd, EAT [2004] ICR 299

Teacher applying for ill-health retirement benefit on ground of permanent incapacity — Whether contract terminating by teacher's resignation on receipt of benefit — Whether employer required to serve notice of dismissal **Healey v Bridgend County Borough Council (Note),** CA [2004] ICR 561

Teacher applying for ill-health retirement benefit on ground of permanent incapacity — Whether contract terminating on acceptance of benefit — Whether employers required to serve notice of dismissal — Education (Teachers' Qualifications and Health Standards) (England) Regulations 1999, reg 7(1) **R (Verner) v Derby City Council,** Lindsay J [2004] ICR 535

EMPLOYMENT—*continued*

Contract of employment—*continued*

Termination—continued

Teacher incapable of work due to ill health — Whether contract automatically terminated by incapacity — Education (Teachers' Qualifications and Health Standards) (England) Regulations 1999, reg 7 **R (Dorling) v Sheffield City Council**, Goldring J [2003] ICR 424

Variation see TRADE UNION: **Shop stewards:** *Authority of*

Disability

Employment

Former employee

Dismissal for ill-health upheld on internal appeal — Complaint of failure to make reasonable adjustments including employers' rejection of claimant's post-dismissal request to revoke dismissal — Whether "act extending over a period" — Whether jurisdiction to consider post-dismissal claim — Complaint 2 days out of time due to secretarial oversight — Whether just and equitable to extend time — Disability Discrimination Act 1995, s 6(1), Sch 3, para 3
Baynton v South West Trains Ltd, EAT [2005] ICR 1730

Employer's insolvency

Administration order

Administrator adopting contracts of employment — Whether "wages or salary" including liability to pay damages for wrongful dismissal — Whether expense of administration — Whether necessary disbursement — Whether payable in priority — Insolvency Act 1986, Sch B1 (as inserted by Enterprise Act 2002, s 248), para 99(3)(4)(5)(6) — Insolvency Rules 1986, r 2.67(1)(f) (as substituted by Insolvency (Amendment) Rules 2003, Sch 1, Pt 2, para 9)
In re Leeds United Association Football Club Ltd, Pumfrey J [2007] ICR 1688

Redundancy payments and unfair dismissal claims on termination by administrator of employees' contracts — Whether payable as administration expenses — Insolvency Act 1986, Sch B1, para 99 (as inserted by Enterprise Act 2002, ss 248(1), 249, Sch 16) — Insolvency Rules 1986, r 2.67(1)(f) (as substituted by Insolvency (Amendment) Rules 2003 Sch 1, r 9)
In re Allders Department Stores Ltd, Lawrence Collins J [2005] ICR 867

Debt due to employee

Employee contractually entitled to specified hourly rate in case of lay-off — Application to Secretary of State for payment — Secretary of State paying lesser amount of statutory guarantee payment — Whether contractual payment "arrears of pay" — Employment Rights Act 1996, ss 28, 182, 184(1)(2) **Benson v Secretary of State for Trade and Industry,** EAT [2003] ICR 1082

Employees owed protective award — Application to Secretary of State for payment — Statutory limit imposed before deductions made — Whether correct method of calculation — Employment Rights Act 1996, s 186(1) — Council Directive 80/987/EEC, art 4(3)
Titchener v Secretary of State for Trade and Industry, EAT [2002] ICR 225

Liability of guarantee institution

Company pension schemes insufficiently funded — Guarantee institution provision giving claimants 20% and 49% of entitlement — Whether Community law obliging member state to provide full guarantee of underfunded schemes — Whether guarantee provision providing "protection" — Member state's liability to individuals for breach of Community obligation — Council Directive 80/987/EEC, art 8
Robins v Secretary of State for Work and Pensions (Case C-278/05), ECJ [2007] ICR 779

Protective award

Payments in lieu of notice — Administrators adopting or about to adopt employees' contracts of employment — Whether protective awards and payments in lieu payable in priority to administration expenses — Insolvency Act 1986, Sch B1, para 99 (as substituted by Enterprise Act 2002, ss 248(1), 249(1)) — Trade Union and Labour Relations (Consolidation) Act 1992, s 189 **Krasner v McMath,** CA [2006] ICR 205

Flexible working

Ground for refusal see **Grievance procedures:** *Standard procedure*

Grievance procedures

Standard procedure

Employee's letter complaining of effect of working conditions on health — Whether "grievance" for purpose of disability discrimination claim — Employment Act 2002, s 32(2), Sch 2, para 6 — Employment Act 2002 (Dispute Resolution) Regulations 2004, reg 2
Canary Wharf Management Ltd v Edebi, EAT [2006] ICR 719

EMPLOYMENT—*continued*

Grievance procedures—*continued*

Standard procedure—continued

Employee's letter of resignation provoking meeting with employer — Employee confirming intention to resign — Complaint of constructive unfair dismissal — Whether resignation letter "set out the grievance in writing" — Whether sufficient to comply with standard procedure — Employment Act 2002, s 32, Sch 2, para 6 **Shergold v Fieldway Medical Centre,** EAT [2006] ICR 304

Employee's request for flexible working refused — Employee resigning two weeks later — Complaint of unfair dismissal — Whether statutory grievance procedure satisfied — Complaint of failure to comply with flexible working provisions — Whether tribunal entitled to examine factual correctness of asserted ground for refusal — Employment Rights Act 1996, ss 80F(1), 80G(1)(b) (as inserted by Employment Act 2002, s 47(1)(2)) — Employment Act 2002, s 32, Sch 2, para 6 — Employment Act 2002 (Dispute Resolution) Regulations 2004, reg 2(2) **Commotion Ltd v Rutty,** EAT [2006] ICR 290

Time limit

Claimant presenting unfair dismissal claim on 27th day after grievance — Whether "less than 28 days . . . passed" — Whether tribunal lacking jurisdiction — Respondent failing to enter response but indicating wish to resist claim — Chairman sitting alone — Whether tribunal properly constituted — Employment Tribunals Act 1996, s 4 — Employment Act 2002, s 32(3) — Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004, Sch 1, r 9 **Basingstoke Press Ltd v Clarke,** EAT [2007] ICR 1284

Employee regarding himself as dismissed complaining to employer of breach of trust and confidence — Whether grievance procedure applicable to claim of constructive unfair dismissal — Whether procedure complied with — Whether time for claim extended — Employee applying to amend automatic unfair dismissal claim to add claim of constructive unfair dismissal — Whether permission to be given — Employment Rights Act 1996, s 95(1)(c) — Employment Act 2002, s 32(3) — Employment Act 2002 (Dispute Resolution) Regulations 2004, regs 2(1), 6(5)(6), 15 **Brock v Minerva Dental Ltd,** EAT [2007] ICR 917

Employee summarily dismissed — Internal appeal against dismissal pending three months later — Whether time extended for subsequent complaints of wrongful dismissal and unlawful race and sex discrimination — Whether statutory grievances procedures applying to claims — Employment Act 2002 (Dispute Resolution) Regulations 2004, regs 6(5)(6), 15(2) **Lambeth London Borough Council v Corlett,** EAT [2007] ICR 88

Grievance lodged before termination of employment — Claims of unfair dismissal and unauthorised deductions made more than three months after termination — Whether grievance "within the normal time limit" for presenting complaints — Whether time limit thereby extended — Employment Rights Act 1996, ss 23, 111 — Employment Act 2002 (Dispute Resolution) Regulations 2004, reg 15 **Prison Service v Barua,** EAT [2007] ICR 671

Grievance relating to dismissal made before coming into force of provision extending time — Whether sufficient to repeat grievance after provision in force — Employment Act 2002 (Dispute Resolution) Regulations 2004, regs 15, 18 **Hart v English Heritage (Historic Buildings and Monuments Commission for England),** EAT [2006] ICR 655

Letter of resignation raising complaints — Complaint of disability discrimination more than four months later — Whether letter "grievance in writing" for purposes of standard procedure — Tribunal rejecting letter but accepting evidence at pre-hearing review as grievance and extending time for complaint — Whether grievance requirement complied with more than one month after end of original time limit — Whether "original time limit" primary period of three months or as extended by tribunal — Disability Discrimination Act 1995, Sch 3, para 3 — Employment Rights Act 1996, s 111(2) — Employment Act 2002, s 32(2)(4), Sch 2, para 6 **Spillett v Tesco Stores Ltd,** EAT [2006] ICR 643

Health and safety disclosure

Former employee

Claimant alleging detriment suffered after termination of employment due to disclosure during employment — Whether tribunal jurisdiction — Employment Rights Act 1996, s 44(1) **Fadipe v Reed Nursing Personnel (Note),** CA [2005] ICR 1760

EMPLOYMENT—*continued*

Maternity rights

Annual leave

Employee's maternity leave coinciding with period for annual leave fixed by collective agreement — Whether employee entitled to take annual leave outside fixed period — Whether entitlement only to minimum period set by Community law or to longer period set by national law — Council Directive 76/207/EEC, art 5(1) — Council Directive 92/85/EEC, art 11(2)(a) — Council Directive 93/104/EC, art 7(1)
Merino Gómez v Continental Industrias del Caucho SA (Case C-342/01),
ECJ [2005] ICR 1040

Return to work

Applicant unable to return on agreed date of return owing to pregnancy-related illness — Employers refusing to allow applicant to return at later date — Whether unfair dismissal — Whether sex discrimination — Sex Discrimination Act 1975, s 6(2) — Employment Protection (Consolidation) Act 1978, ss 42(1) (as substituted by Trade Union Reform and Employment Rights Act 1993, s 23(1)(b), Sch 2), 56 **Halfpenny v IGE Medical Systems Ltd,**
HL(E) [2001] ICR 73

National minimum wage *see* **Working time provisions:** *Rest periods*

Partnership

Continuity of employment

Claimants employed by partnership of two solicitors — One solicitor struck off — Whether continuity of employment maintained where partnership dissolved and business carried on by sole partner — Employment Rights Act 1996, s 218(5) **Bower v Stevens,**
CA [2004] ICR 1582

Pension scheme

Entitlement to pension

Claimant convicted of manslaughter of retired police officer husband — Whether entitlement to widow's pension under police scheme forfeited — Police Pensions Act 1976, s 1(3) — Forfeiture Act 1982, s 1(1) — Police Pensions Regulations 1987, reg K5
Glover v Staffordshire Police Authority, McCombe J [2007] ICR 661

Redundancy — Whether retirement "at employer's request" — Whether distinction between compulsory and voluntary redundancy
AGCO Ltd v Massey Ferguson Works Pension Trust Ltd, CA [2004] ICR 15

Final salary

Remuneration for purposes of calculating final salary excluding "non contractual" overtime — Employee's contractual duties involving work outside normal hours — Whether pay for overtime worked to be included in calculation — Local Government Pension Scheme Regulations 1995, reg C2 **Newham London Borough Council v Skingle,**
Jacob J [2002] ICR 1118
CA [2003] ICR 1008

Teacher moving to lower pay scale on restructuring but maintaining nominal salary — Whether employed at "reduced rate of contributable salary" — Teachers' Pensions Regulations 1997, regs C1(2), H1, Sch 10, Pt II, para 13 **Secretary of State for Education and Skills v Bailey,**
Pumfrey J [2004] ICR 181

Retirement

Executive director relinquishing responsibilities of managing director but continuing as unpaid non-executive director — Whether "retirement" — Whether payments from pension fund chargeable to tax — Income and Corporation Taxes Act 1988, s 600(1)(2)
Venables v Hornby, Lawrence Collins J [2002] ICR 81
CA [2003] ICR 186
HL(E) [2004] ICR 42

Police

Pension

Policewoman diagnosed as suffering vulnerability to anxiety disorder — Certified as permanently disabled as member of force subject to diagnosis amounting to "infirmity" — Whether certificate impermissibly qualified — Whether vulnerability to anxiety "infirmity" — Police Pensions Regulations 1987, reg A12(2)(5) (as amended by Police Pensions (Amendment) (No 2) Regulations 2003, Sch 1, para 1) **R (Northumbria Police Authority) v Broome,**
Bennett J [2006] ICR 555

EMPLOYMENT—*continued*

Protected disclosure

Compensation

Complaint of subjection to detriment — Employee constructively dismissed — Whether compensation recoverable for injury to feelings up to resignation — Complaint of unfair dismissal — Compensation for future loss discounted for accelerated payment — Whether appropriate to apply equivalent increase for delayed payment — Whether just and equitable to reduce compensation for misconduct unconnected with dismissal — Employment Rights Act 1996, ss 47B (as inserted by Public Interest Disclosure Act 1998, s 18(2)), 49, 123
Melia v Magna Kansei Ltd, EAT [2005] ICR 874

Complaint of subjection to detriment — Employee constructively dismissed — Whether compensation recoverable for injury to feelings up to dismissal — Complaint of unfair dismissal — Compensation for future loss discounted for accelerated payment — Whether appropriate to apply equivalent increase for delayed payment — Employment Rights Act 1996, ss 47B, 103A (as inserted by Public Interest Disclosure Act 1998, ss 2, 5), 49, 123
Melia v Magna Kansei Ltd, CA [2006] ICR 410

Complaint

Compromise agreement on termination of employment — Agreement compromising "all claims" arising out of employment — No specific reference to claim of detriment from protected disclosure — Whether claim precluded by agreement — Employment Rights Act 1996, s 203
University of East London v Hinton, CA [2005] ICR 1260

Disclosures prior to provisions coming into effect

Employee suspended from work for breach of confidence while absent due to stress-related illness — Dismissal for incapacity two days after protected disclosure provisions coming into force — Whether employee subjected to any relevant detriment by act or deliberate failure to act by employer — Employment Rights Act 1996, s 47B(1) (as inserted by Public Interest Disclosure Act 1998, s 2) **Pinnington v Swansea City and County Council,** CA [2005] ICR 685

Former employee

Claimant alleging detriment suffered after termination of employment due to protected disclosure during employment — Whether tribunal jurisdiction — Employment Rights Act 1996, ss 47B, 48(1A) (as inserted by Public Interest Disclosure Act 1998, ss 2, 3), 230(3)
Woodward v Abbey National plc (No 1), EAT [2005] ICR 1750
CA [2006] ICR 1436

Qualifying disclosure

Claimant believing offence of incitement to racial hatred committed — Tribunal finding incitement relating to religion and no offence committed — Whether belief offence committed thereby unreasonable — Employment Rights Act 1996, s 43B(1) (as inserted by Public Interest Disclosure Act 1998, s 1) **Babula v Waltham Forest College,** CA [2007] ICR 1026

Employee disciplined after accessing employer's computer system to demonstrate lack of security — Whether whole course of conduct continuing act of "disclosure" — Whether act of disclosure causative of disciplinary action — Employment Rights Act 1996, s 43B(1) (as inserted by Public Interest Disclosure Act 1998, s 1) **Bolton School v Evans,**
CA [2007] ICR 641

Reasonable belief

Employee dismissed following disclosure of information — Tribunal finding information disclosed factually incorrect — Whether employee having "reasonable belief" disclosure showing relevant failure — Whether "protected disclosure" — Employment Rights Act 1996, s 43B(1) (as inserted by Public Interest Disclosure Act 1998, s 1)
Darnton v University of Surrey, EAT [2003] ICR 615

Remedy

Statutory provisions coming into force after disclosure but before employer's detrimentary act — Whether statutory remedy available — Employment Rights Act 1996, s 47B (as inserted by Public Interest Disclosure Act 1998, s 2) **Meteorological Office v Edgar,**
EAT [2002] ICR 149

Teacher subjected to detriment and dismissal for making protected disclosure — Award of £42,500 for injury to feelings — Whether excessive — Whether aggravated damages available — Whether exemplary damages available — Employment Rights Act 1996, ss 47B (as inserted by Public Interest Disclosure Act 1998, s 2), 49 **Virgo Fidelis Senior School v Boyle,**
EAT [2004] ICR 1210

EMPLOYMENT—*continued*

Protected disclosure—*continued*

Time limit

Succession of acts complained of — Tribunal at pre-hearing review deciding not "series of similar acts" and ruling majority out of time — Whether ruling appropriate without hearing evidence — Whether apparently unconnected acts capable of forming "series of similar acts" — Employment Rights Act 1996, s 48(3)
Arthur v London Eastern Railway Ltd (trading as One Stansted Express), CA [2007] ICR 193

Unfair dismissal

Employee complaining of detriment and dismissal for making protected disclosure — Tribunal finding protected disclosure principal reason for dismissal — Employer's witnesses as to employees' good faith and reasonableness of disclosure excluded — Whether relevant evidence — Employment Rights Act 1996, ss 47B, 103A (as inserted by Public Interest Disclosure Act 1998, ss 2, 5) **ALM Medical Services Ltd v Bladon,** CA [2002] ICR 1444

Employer claiming dismissal for reason unconnected with protected disclosures — Tribunal rejecting reason relied on by employer — Whether tribunal to infer protected disclosure true reason — Tribunal finding dismissal for reasons relied on by neither party — Correct approach to evidential burden — Employment Rights Act 1996, s 103A (as inserted by Public Interest Disclosure Act 1998, s 18(2)) **Kuzel v Roche Products Ltd,** EAT [2007] ICR 945

Tribunal finding disclosures made for reasons of personal antagonism — Whether employee's motive relevant to assessment of good faith — Whether post disclosure conduct relevant — Employment Rights Act 1996, ss 43G(1)(a), 103A (as inserted by Public Interest Disclosure Act 1998, ss 1, 5) **Street v Derbyshire Unemployed Workers' Centre,** EAT [2004] ICR 213
CA [2005] ICR 97

Worker

Claimant supplying services to consultancy through own company — Consultancy contracting with end user — Whether claimant "introduced" or "supplied" to end user by consultancy — Whether claimant "worker" — Employment Rights Act 1996, ss 43K, 47B (as inserted by Public Interest Disclosure Act 1998, ss 1, 2), 230(3)
Croke v Hydro Aluminium Worcester Ltd, EAT [2007] ICR 1303

Redundancy *see also* **Unfair dismissal:** *Excluded classes*

Continuity of employment

Employee participating in employer's child break scheme after 17 years' employment — Scheme guaranteeing re-employment at same level while requiring employee to resign and work for minimum of 2 weeks each year — Employee made redundant after returning to work — Whether relations with employer governed by contract of employment during break — Whether employee to be regarded as continuing in employment by arrangement — Whether "continuously employed" — Employment Rights Act 1996, ss 162(1), 212(1)(3)(c)
Curr v Marks & Spencer plc, CA [2003] ICR 443

Dismissal for redundancy

Law Society intervention in firm of solicitors — Agents effecting intervention telling employees no longer required but free to remain on voluntary basis — Transfer of firm — Whether intervention operating to terminate contracts of employment — Whether employees dismissed — Solicitors Act 1974, s 35 — Employment Rights Act 1996, s 136(5)
Barnes v Leavesley, EAT [2001] ICR 38

Law Society intervention in solicitor's practice — Transfer of firm — Whether intervention operating to terminate contracts of employment — Whether employee dismissed — Solicitors Act 1974, s 35, Sch 1, para 16 — Employment Rights Act 1996, s 136(5) **Rose v Dodd,**
CA [2005] ICR 1776

Trade union consultation

Merger of companies resulting in redundancies — Whether duty to consult arising before employers' proposals formulated — Field staff assigned to branch offices — Whether branch office relevant "establishment" — Trade Union and Labour Relations (Consolidation) Act 1992, s 188(1)(1A) (as substituted by Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 1995, reg 3) — Council Directive 75/129/EEC, arts 1, 2 (as amended by Council Directive 92/56/EC, art 1)
MSF v Refuge Assurance plc, EAT [2002] ICR 1365

Parent company withdrawing financial support from employers — Employees dismissed without proper consultation — Whether special circumstances — Trade Union and Labour Relations (Consolidation) Act 1992, s 188(4)(7) (as amended by Trade Union Reform and Employment Rights Act 1993, s 34(2) and Collective Redundancies and Transfer of Undertakings Regulations 1995, reg 3) — Council Directive 98/59/EC, art 2 **GMB v Amicus,**
EAT [2003] ICR 1396

EMPLOYMENT—*continued*

Redundancy—*continued*

Trade union consultation—continued

Protective award — Approach to assessment — Trade Union and Labour Relations (Consolidation) Act 1992, s 189 (as amended by Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 1995, reg 4 and Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 1999, reg 5) **Susie Radin Ltd v GMB,** CA [2004] ICR 893

Protective award — Award made more than three months after expiry of protected period — Failure to pay remuneration under award — Whether reasonably practicable to present complaint in time — Whether further period reasonable — Trade Union and Labour Relations (Consolidation) Act 1992, ss 189(2)(3), 192
Howlett Marine Services Ltd v Bowlam, EAT [2001] ICR 595

Protective award — Union recognised in respect of part only of workforce — Whether award capable of extending to other redundant employees — Trade Union and Labour Relations (Consolidation) Act 1992, ss 188(1)(1B), 189(1)(3) (as substituted by Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 1995, regs 3, 4 and Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 1999, regs 3(2)(3), 5(2))
Transport and General Workers' Union v Brauer Coley Ltd, EAT [2007] ICR 226

Trade union securing protective award — Employees dismissed after expiry of protected period working and paid during that period — Whether entitled to remuneration under award — Trade Union and Labour Relations (Consolidation) Act 1992, s 190(4) (as amended by Employment Rights Act 1996, Sch 1, para 56(14)) **Cranswick Country Foods plc v Beall,** EAT [2007] ICR 691

Work of a particular kind

Reorganisation by employer — Employee refusing to undertake additional duties — Whether diminution in employer's requirements for work of a particular kind — Whether dismissal by reason of redundancy — Employment Rights Act 1996, s 139(1)(b)(i)
Shawkat v Nottingham City Hospital NHS Trust (No 2), CA [2002] ICR 7

Right to be accompanied

Disciplinary hearing

Employee refused representation at investigatory interview resulting in oral warning — Warning remaining on employee's record for 12 months — Whether "formal warning" — Whether interview "disciplinary hearing" — Employment Relations Act 1999, ss 10, 13(4)
London Underground Ltd v Ferenc-Batchelor, EAT [2003] ICR 656

Statutory procedures

Remedies

Employer failing to provide particulars of employment — Employee dismissed within one year of employment — Employee complaining dismissal resulting from employer's failure to provide particulars and to follow grievance procedure — Whether jurisdiction to consider complaint — Employment Rights Act 1996, ss 1, 11 — Employment Act 2002, s 38
Scott-Davies v Redgate Medical Services, EAT [2007] ICR 348

Time off

Health and safety representative

Employer refusing representative time off with pay to attend training course — Correct test — Whether employment tribunal jurisdiction to hear claim — Whether appeal tribunal jurisdiction to hear appeal — Employment Tribunals Act 1996 ss 2, 21(1) (as amended by Employment Rights (Dispute Resolution) Act 1998, Sch 1, para 17) — Safety Representatives and Safety Committees Regulations 1977, regs 4(2), 11 — Trade Union and Labour Relations Act 1974, Sch 1, para 16(1) **Duthie v Bath and North East Somerset Council,** EAT [2003] ICR 1405

Time off for dependants

Parental leave

Employee absent for one day to look after son — Whether entitled to leave for one day only — Employment Rights Act 1996, s 47C (as inserted by Employment Relations Act 1999, Sch 4, Pt III, para 8) — Maternity and Parental Leave etc Regulations 1999, Sch 2, para 7
New Southern Railway Ltd (formerly South Central Trains Ltd) v Rodway, CA [2005] ICR 1162

Employee given written warning for non-attendance at work when absent for one day to look after son — Whether employee entitled to leave for one day only — Whether detriment for reason relating to parental leave — Employment Rights Act 1996, s 47C (as inserted by Employment Relations Act 1999, Sch 4, Pt III, para 8) — Maternity and Parental Leave etc Regulations 1999, Sch 2, para 7 **South Central Trains Ltd v Rodway,** EAT [2005] ICR 75

EMPLOYMENT—*continued*

Time off for dependants—*continued*

Reason for absence

Employee requesting time off to look after child — Employee failing to explain breakdown in childcare arrangements to employer — Whether telling employer of reason for absence — Employment Rights Act 1996, s 57A(2) (as inserted by Employment Relations Act 1999, s 8, Sch 4, Pt II) **Truelove v Safeway Stores plc,** EAT [2005] ICR 589

Unfair dismissal

Employee dismissed for high level of absences claiming entitled to time off to deal with child's illness — Dispute as to employee's compliance with requirement to inform employer — Relevant factors in determining whether time taken necessary and reasonable — Employment Rights Act 1996, ss 57A, 99 (as inserted and substituted by Employment Relations Act 1999, ss 8, 9, Sch 4, Pt II, Pt III, para 16) **Qua v John Ford Morrison,** EAT [2003] ICR 482

Employee suffering bereavement reaction dismissed for absence following parents' deaths — Whether time off to take action necessary in consequence of deaths — Employment Rights Act 1996, ss 57A, 99 (as inserted and substituted by Employment Relations Act 1999, s 8, 9, Sch 4, Pt II, Pt III, para 16) **Forster v Cartwright Black,** EAT [2004] ICR 1728

Transfer of undertaking

Effect of transfer

Employee complaining of unfair dismissal on trade union grounds granted interim order continuing employment — Transfer of employer's undertaking — Whether relationship under order constituting "contract of employment" for purposes of transfer — Whether employer's liability under continuation order transferring to transferee — Trade Union and Labour Relations (Consolidation) Act 1992, ss 163, 164 — Employment Rights Act 1996, s 230(2) — Transfer of Undertakings (Protection of Employment) Regulations 1981, regs 2(1), 5(1)
Dowling v M E Ilic Haulage, EAT [2004] ICR 1176

Employee's claim in negligence for injury at work — Whether liability transferring to transferee — Claim covered by transferor's employer's liability insurance — Whether transferor's rights under policy transferring to transferee — Transfer of Undertakings (Protection of Employment) Regulations 1981, reg 5(2) **Martin v Lancashire County Council,** CA [2001] ICR 197

Employer discontinuing business giving notice of dismissal — Employees continuing business after dismissal date — Whether liability for redundancy and short notice transferring to employees — Transfer of Undertakings (Protection of Employment) Regulations 1981, reg 5
Matthews (trading as Anton Motors) v Smith, CA [2003] ICR 460

Flying crew with contractual retirement age of 60 — Undertaking transferred to company with retirement age of 55 for flying crew — Transferred employees required to retire at 55 — Whether "normal retiring age" 60 or 55 — Whether precluded from complaining of unfair dismissal — Employment Rights Act 1996, s 109 — Transfer of Undertakings (Protection of Employment) Regulations 1981, reg 5 **Cross v British Airways plc,** CA [2006] ICR 1239

Pension scheme

Early retirement benefits — Transferee offering less favourable terms than transferor — Whether "old-age . . . benefits" — Whether transferred employees entitled to benefit of transferor's terms — Whether employees accepting early retirement waiving right to transferor's terms — Council Directive 77/187/EEC, art 3 **Martin v South Bank University (Case C-04/01),** ECJ [2004] ICR 1234

Early retirement benefits payable on redundancy — Whether "old-age . . . benefits" — Whether liability for benefits transferring to transferee — Benefits implemented by statutory instrument — Whether relevant — Council Directive 77/187/EEC, art 3
Beckmann v Dynamco Whicheloe Macfarlane Ltd (Case C-164/00), ECJ [2003] ICR 50

Procedural fairness

Employees made redundant following selection process — Employer providing employees with selection criteria only — Whether sufficient to comply with statutory dismissal procedure — Whether dismissals automatically unfair — Tribunal finding 100% chance of dismissal in any event — Whether decisions to dismiss not unreasonable — Employment Rights Act 1996, s 98A(1)(2) (as inserted by Employment Act 2002, s 34) — Employment Act 2002, Sch 2, Pt I, Ch 1 **Alexander v Brigden Enterprises Ltd,** EAT [2006] ICR 1277

EMPLOYMENT—*continued*

Transfer of undertaking—*continued*

Protection of employees

Civil servants seconded to work for training and enterprise council on transfer of business to council — Applicants electing to become employees of council 3 years later — Whether transfer of undertaking already completed — Whether applicants' employment transferred — Whether continuity of employment preserved — Council Directive 77/187/EEC, art 3(1)
CELTEC Ltd v Astley, CA [2002] ICR 1289
North Wales Training and Enterprise Council Ltd (trading as CELTEC Ltd) v Astley, HL(E) [2006] ICR 992

Civil servants seconded to work for training and enterprise council on transfer of business to council — Applicants electing to become employees of council 3 years later — Whether transfer of undertaking already completed — Whether "date of a transfer" point in time only or also extending to period of time — Council Directive 77/187/EEC, art 3(1)
CELTEC Ltd v Astley (Case C-478/03), ECJ [2005] ICR 1409

Employees benefiting from transferor's profit-sharing scheme — Whether entitled to retain benefit of same scheme on transfer — Transfer of Undertakings (Protection of Employment) Regulations 1981, reg 5(2) **MITIE Management Services Ltd v French,** EAT [2002] ICR 1395

Employee's contractual retirement age changed from 60 to 65 on transfer of employment — Employee dismissed at 60 — Whether variation void — Whether enforceable at option of employee — Transfer of Undertakings (Protection of Employment) Regulations 1981, reg 12
Power v Regent Security Services Ltd, EAT [2007] ICR 970

Failure to consult workforce — Applicant redundant because of transfer — No employee representatives — Whether duty to consult individual employees — Transfer of Undertakings (Protection of Employment) Regulations 1981, regs 10, 11 (as amended by Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 1999, reg 2) **Howard v Millrise Ltd,** EAT [2005] ICR 435

Failure to consult workforce — Whether liability for failure transferring to transferee — Transfer of Undertakings (Protection of Employment) Regulations 1981, regs 5, 10, 11 (as amended by Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 1999, reg 2) **Alamo Group (Europe) Ltd v Tucker,** EAT [2003] ICR 829

Ferry service — Whether seafarers excluded from protection — Whether domestic legislation ultra vires — Ships not acquired by new provider — Whether relevant transfer of undertaking — European Communities Act 1972, s 2(2) — Transfer of Undertakings (Protection of Employment) Regulations 1981, reg 2(2) — Council Directive 77/187/EEC, art 1(3)
NUMAST v P & O Scottish Ferries Ltd, EAT(Sc) [2005] ICR 1270

Trade union complaining of failure to consult prior to transfer — Whether liability for failure devolving on transferees — Transfer of Undertakings (Protection of Employment) Regulations 1981, regs 5, 10, 11 (as amended by Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 1995, reg 2)
Transport & General Workers' Union v McKinnon, J R Haulage Ltd, EAT(Sc) [2001] ICR 1281

Relevant transfer

Local authority maintenance work contracted out to private company — Company going into liquidation — Work continuing on informal basis — Local authority terminating arrangement and carrying out work itself — Company ceasing business — Whether transfer of undertaking back to local authority — Transfer of Undertakings (Protection of Employment) Regulations 1981, reg 3 — Council Directive 77/187/EEC, art 1(1)
Perth and Kinross Council v Donaldson, EAT(Sc) [2004] ICR 667

Unfair dismissal

Employee resigning following changes to working conditions — Complaint of unfair dismissal — Whether necessary to establish repudiatory breach of contract by employer — Employment Rights Act 1996, s 95(1)(c) — Transfer of Undertakings (Protection of Employment) Regulations 1981, regs 5(5) (as amended by Trade Union Reform and Employment Rights Act 1993, s 33), 8(1) — Council Directive 77/187/EEC, art 4(2) **Rossiter v Pendragon plc,** EAT [2001] ICR 1265
CA [2002] ICR 1063

EMPLOYMENT—*continued*

Transfer of undertaking—*continued*

Whether relevant transfer

Body governed by private law carrying out activities promoting interests of local authority — Activities taken over by local authority — Whether "transfer" of undertaking — Council Directive 77/187/EEC, art 1(1)
Mayeur v Association Promotion de l'Information Messine (APIM) (Case C-175/99), ECJ [2002] ICR 1316

Electrician performing routine maintenance at airbase — Maintenance work at base divided into packages and offered to tender — Electrician's work forming one package — Whether package "undertaking" transferred — Transfer of Undertakings (Protection of Employment) Regulations 1981, reg 3(1) **Dudley Bower Building Services Ltd v Lowe,** EAT [2003] ICR 843

Ferry service employing 12 of its workers on short-term contracts in different capacities on different vessels — Short-term contracts not renewed and workers engaged by respondent and supplied to do same work — Whether workers economic entity — Whether relevant transfer — Transfer of Undertakings (Protection of Employment) Regulations 1981, reg 3
Wain v Guernsey Ship Management Ltd, CA [2007] ICR 1350

Hospital cleaning and catering services moving to different hospital — Employees not transferring — Whether transfer of undertaking — Transfer of Undertakings (Protection of Employment) Regulations 1981, reg 3(1) **RCO Support Services Ltd v UNISON,** CA [2002] ICR 751

Local authority awarding contract for bus service to new operator following tendering procedure — No contractual link between old and new operators — No transfer of significant tangible assets but some drivers re-engaged — Whether relevant transfer — Council Directive 77/187/EEC, art 1(1) — Council Directive 92/50/EEC, art 3(1)
Liskojärvi v Oy Liikenne Ab (Case C-172/99), ECJ [2002] ICR 155

Local authority maintenance contract for whole borough re-contracted to two new contractors partition on borough into two areas — Whether transfer of "a part of an undertaking" to new contractor — Transfer of Undertakings (Protection of Employment) Regulations 1981, regs 2(2), 3(1) **Fairhurst Ward Abbotts Ltd v Botes Building Ltd,** CA [2004] ICR 919

Local authority non-profit-making refuse service transferred to profit-making company — Whether service "in the nature of a commercial venture" — Whether employees' rights protected — Transfer of Undertakings (Protection of Employment) Regulations 1981, reg 2(1) — Council Directive 77/187/EEC, art 1 **Alderson v Secretary of State for Trade and Industry,** CA [2004] ICR 512

Parent company selling subsidiary by share sale — Whether business transferred — Whether appropriate to consider piercing corporate veil — Transfer of Undertakings (Protection of Employment) Regulations 1981, reg 3 **The Print Factory (London) 1991 Ltd v Millam,** CA [2007] ICR 1331

Service user undertaking provision of services on insolvency of provider — No identifiable economic entity for provision of services to user prior to transfer — Whether relevant transfer — Whether transfer precluded by insolvency of transferor — European Communities Act 1972, s 2(2) — Transfer of Undertakings (Protection of Employment) Regulations 1981, reg 3
Transport and General Workers' Union v Swissport (UK) Ltd, EAT [2007] ICR 1593

Transfer from one undertaking to another of service contracted out by public body — Council Directive 77/187/EEC, art 1(1)
Sánchez Hidalgo v Asociación de Servicios Aser (Case C-173/96) (Note), ECJ [2002] ICR 73

Transfer from public body to private-law company owned by state — Whether within scope of Community Directive — Transferee liable to employees for payments linked to length of service — Whether length of service with transferor to be taken into account — Council Directive 77/187/EEC, arts 1(1), 3(1) **Collino v Telecom Italia SpA (Case C-343/98),** ECJ [2002] ICR 38

EMPLOYMENT—*continued*
Unfair dismissal
Compensation
Assessment *see also* **Protected disclosure:** *Compensation*

Applicant receiving incapacity benefit — Whether deductible from compensatory award for loss of earnings — Employment Rights Act 1996, s 123(1)
Morgans v Alpha Plus Security Ltd, EAT [2005] ICR 525

Claimants receiving early pension payments — Whether to be set off against compensatory award — Whether compensation recoverable for loss of life assurance cover between dismissal and tribunal hearing — Employment Rights Act 1996, s 123
Knapton v ECC Card Clothing Ltd, EAT [2006] ICR 1084

Employee claiming compensation for injury to feelings arising from manner of dismissal — Whether jurisdiction to compensate for non-economic loss — Employment Rights Act 1996, s 123(1) **Dunnachie v Kingston upon Hull City Council,** EAT [2003] ICR 1294
CA [2004] ICR 481
HL(E) [2004] ICR 1052

Employee dismissed without notice during period of sick leave when entitled under contract to sick pay — Whether compensation for pay in notice period to be based on full pay — Employment Rights Act 1996, s 123 **Langley v Burlo,** CA [2007] ICR 390

Employee dismissed without notice during period of sick leave when entitled under contract to sick pay only — Whether compensation for pay in lieu of notice to be based on full pay — Whether damages for wrongful dismissal limited to contractual entitlement — Employment Rights Act 1996, ss 87(4), 88(1), 123 **Langley v Burlo,** EAT [2006] ICR 850

Employer failing to carry out redundancy exercise properly — Tribunal finding evidence insufficient to say employees would have been dismissed if fair procedure followed — Whether tribunal required to consider reducing compensation for chance employees would have been dismissed in any event — Employment Rights Act 1996, s 123(1)
Software 2000 Ltd v Andrews, EAT [2007] ICR 825

Employment tribunal attempting to assess duration of employment if claimant not unfairly dismissed — Tribunal acknowledging assessment highly speculative — Whether tribunal right to attempt assessment — Employment Rights Act 1996, s 123(1) **Thornett v Scope,**
CA [2007] ICR 236

Employer unfairly imposing unreasonable reduction in commission — Whether compensation to be reduced on basis employees would have rejected reasonable terms after fair consultation — Employment Rights Act 1996, s 123(1) **Gover v Propertycare Ltd,**
CA [2006] ICR 1073

Failure to comply with reinstatement order — Calculation of compensatory award — Employment Rights Act 1996, ss 114(2), 117(3), 124
Parry v National Westminster Bank plc, CA [2005] ICR 396

Loss of future earnings

Claimant suffering from medical condition not due to work — Condition exacerbated by employer's treatment of claimant — Claimant constructively dismissed unfairly — Correct approach to pre-existing condition when determining future losses — Employment Rights Act 1996, s 123 **Seafield Holdings Ltd (trading as Seafield Logistics) v Drewett,**
EAT [2006] ICR 1413

Employee too ill to work due to employers' repudiatory conduct — Employee continuing to receive pay before resigning following employers' failure to deal with grievances — Whether constructive dismissal — Whether loss of earnings "in consequence of the dismissal" — Whether recoverable on complaint of unfair dismissal — Employment Rights Act 1996, ss 95(1)(c), 123(1) **GAB Robins (UK) Ltd v Triggs,**
EAT [2007] ICR 1424

Tribunal assessing loss by reference to Ogden Tables — Whether appropriate
Kingston upon Hull City Council v Dunnachie (No 3),
EAT [2004] ICR 227

Mitigation of loss

Employee dismissed on medical grounds following back injury — Tribunal finding dismissal unfair — Employee refusing offer of re-engagement on part-time basis — Whether failure to mitigate loss **Wilding v British Telecommunications plc,**
CA [2002] ICR 1079

EMPLOYMENT—*continued*

Unfair dismissal—*continued*

Compensation—continued

Mitigation of loss—*continued*

Employee receiving pay in lieu of notice obtaining employment in notice period — Whether credit to be given for earnings in calculating compensatory award — Employment Rights Act 1996, s 123 **Voith Turbo Ltd v Stowe,** EAT [2005] ICR 543

Employee summarily dismissed starting new employment during notice period — Whether credit to be given for earnings in calculating compensatory award — Employment Rights Act 1996, s 123 **Hardy v Polk (Leeds) Ltd (Note),** EAT [2005] ICR 557

Pension rights *see* DISCRIMINATION: **Damages:** *Compensation:* Pension rights

Reinstatement order

Tribunal making reinstatement order with compensation for loss of pay — Employer failing to comply with reinstatement order — Calculation of compensatory award — Whether tribunal entitled to include losses prior to date ordered for reinstatement — Employment Rights Act 1996, ss 114(2), 117(3) **Awotona v South Tyneside Healthcare NHS Trust,** CA [2005] ICR 958

Complaint

Time limit

Complaint posted by first class post on Friday before expiry of time limit on Sunday — Complaint failing to arrive until Tuesday — Whether "reasonably practicable" to have presented complaint in time — Regime for service of documents in employment tribunals — Employment Rights Act 1996, s 111(2) **Consignia plc (formerly The Post Office) v Sealy,** CA [2002] ICR 1193

Complaint sent to tribunal by e-mail 8 hours before expiry of time limit — No indication not received — Complaint presented in person two days after inquiries revealing e-mail not received — Whether "reasonably practicable" to have presented complaint in time — Employment Rights Act 1996, s 111(2)(b) **Initial Electronic Security Systems Ltd v Avdic,** EAT [2005] ICR 1598

Complaint sent within time limit online to Employment Tribunals Service website — Website operated by service provider — Complaint not received by employment tribunal — Whether presented in time — Employment Rights Act 1996, s 111 **Tyne and Wear Autistic Society v Smith,** EAT [2005] ICR 663

Employee unsuccessfully pursuing internal appeal before presenting complaint — Complaint out of time — Whether "reasonably practicable" for complaint to be presented in time — Employment Rights Act 1996, s 111(2) **Marks & Spencer plc v Williams-Ryan,** CA [2005] ICR 1293

Constructive dismissal

Claimant relying on number of incidents as breach by employer of implied term of trust and confidence — Whether tribunal required to make express finding on each incident — Tribunal disregarding incidents prior to employee's acceptance of promotion — Whether correct approach to waiver **Royle v Greater Manchester Police Authority,** EAT [2007] ICR 281

Employee demoted because of pregnancy — Reduction in salary — Employee continuing pursuant to contract for six months before resigning — Whether contract affirmed — Whether payment month by month of reduced salary constituting continuing repudiatory breach by employer — Whether constructive dismissal **New Southern Railway Ltd v Quinn,** EAT [2006] ICR 761

Transsexual's employment ceasing due to lack of funding — Member of selection panel for alternative job alleged to be transphobic — Whether breach of mutual trust and confidence — Formulation of implied term **Baldwin v Brighton and Hove City Council,** EAT [2007] ICR 680

Tribunal dismissing complaint after hearing only applicant's evidence — Whether reasonable exercise of discretion **Logan v Customs and Excise Comrs,** CA [2004] ICR 1

Continuous employment

Dismissed employee reinstated on internal appeal two months later — Employer one month later deciding not to reinstate — Whether reinstatement taking place — Whether "arrangement" preserving continuity of employment between initial dismissal and reinstatement — Whether employee having necessary period of continuous employment — Employment Rights Act 1996, s 212(3)(c) **London Probation Board v Kirkpatrick,** EAT [2005] ICR 965

EMPLOYMENT—*continued*

Unfair dismissal—*continued*

Dismissed

Agreement to terminate employment — Employee faced with choice between job change or redundancy accepting redundancy — Whether dismissed **Lassman v De Vere University Arms Hotel,** EAT [2003] ICR 44

Employer's appeal procedure — Employee dismissed for misconduct initiating appeal — Presentation of unfair dismissal complaint while appeal pending — Employer substituting demotion for dismissal on appeal — Whether employee "dismissed" for purposes of unfair dismissal complaint **Roberts v West Coast Trains Ltd,** CA [2005] ICR 254

Employee dismissed in breach of statutory procedures — Employer withdrawing dismissal on appeal — Employee refusing to accept withdrawal — Whether employee "dismissed" for purposes of automatic unfair dismissal claim — Employment Rights Act 1996, s 98A(1) (as inserted by Employment Act 2002, s 34(2)) **Brock v Minerva Dental Ltd,** EAT [2007] ICR 917

Repudiatory conduct *see also* INDUSTRIAL RELATIONS: **Employment tribunals:** *Review of decision*

Cumulative acts by employer — Employee resigning in response to act of employer found to be reasonable and justifiable — Whether sufficient to constitute last straw entitling employee to resign **Omilaju v Waltham Forest London Borough Council,** CA [2005] ICR 481

Employee with no disciplinary record leaving workplace for 1 hour without permission — Employer imposing final written warning — Whether capable of amounting to repudiatory breach by employer **Stanley Cole (Wainfleet) Ltd v Sheridan,** EAT [2003] ICR 297

Resignation

Employee called to meeting and told he was being dismissed for misconduct — Majority of meeting then spent negotiating terms of employee's departure — Whether employee dismissed **Sandhu v Jan de Rijk Transport Ltd,** CA [2007] ICR 1137

Excluded classes

Police

Transport police sergeant's complaint of unfair dismissal — Whether transport police "constabulary maintained by virtue of an enactment" — Whether sergeant employed in "police service" — British Transport Commission Act 1949, s 53(1) (as amended by Railways Act 1993, Sch 10, para 1) — Employment Rights Act 1996, s 200 **Spence v British Railways Board,** EAT [2001] ICR 232

Retirement

Normal retiring age — Employee with unique position having contractual retirement age of 70 — Whether "normal retiring age" — Employment Rights Act 1996, s 109(1)(a)(i) **Wall v British Compressed Air Society,** CA [2004] ICR 408

Work outside Great Britain *see also* INDUSTRIAL RELATIONS: **Employment tribunals:** *Jurisdiction*

Overseas security officer employed by foreign office working almost exclusively abroad — Whether tribunal having jurisdiction to hear unfair dismissal complaint — Whether acceptance of jurisdiction determinative of Great Britain as place employed for purposes of redundancy — Employment Rights Act 1996, ss 139(1), 196 **Pitman v Foreign and Commonwealth Office,** EAT [2003] ICR 699

Pilots employed by Hong Kong company required by contracts of employment to be based in Great Britain — Whether in employment in Great Britain — Whether employment tribunal jurisdiction to hear unfair dismissal claims — Whether appropriate forum for breach of contract claims — Employment Rights Act 1996, s 94(1) — Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004, Sch 1, r 10(2)(h) **Crofts v Cathay Pacific Airways Ltd,** CA [2005] ICR 1436

Security supervisor employed by English company to work in United Kingdom overseas territory — Whether employment tribunal having jurisdiction to hear complaint of unfair dismissal — Employment Rights Act 1996, ss 94(1), 244(1) **Lawson v Serco Ltd,** CA [2004] ICR 204

Workers employed by British concerns at overseas British military bases — Pilot employed by Hong Kong company contractually based in Great Britain when dismissed — Whether employment tribunal having jurisdiction to hear unfair dismissal claims — Employment Rights Act 1996, s 94(1) **Lawson v Serco Ltd,** HL(E) [2006] ICR 250

Pregnancy

Pregnant employee dismissed for inadequate work performance — Employer unaware of pregnancy — Whether dismissal for reason connected with pregnancy — Maternity and Parental Leave etc Regulations 1999, reg 20(3)(a) **Ramdoolar v Bycity Ltd,** EAT [2005] ICR 368

EMPLOYMENT—*continued*

Unfair dismissal—*continued*

Procedural fairness

Deaf employee dismissed for misconduct following disciplinary hearing — Employee unable to follow proceedings — Interpreter present on appeal — Tribunal finding appeal "review" only and not curing defects of first hearing — Whether proper approach — Whether error to consider procedural unfairness in isolation from reason for dismissal — Employment Rights Act 1996, s 98(4) **Taylor v OCS Group Ltd**, CA [2006] ICR 1602

Disciplinary proceedings against employee on long term sick leave resulting in dismissal — Employer refusing appeal on ground of delay in provision of grounds for appeal — Whether breach of statutory procedure — Whether dismissal automatically unfair — Personnel manager deciding employee guilty of misconduct taking part in four stages of disciplinary process — Whether rendering dismissal unfair — Employment Rights Act 1996, s 98A(1) (as inserted by Employment Act 2002, s 34(2)) — Employment Act 2002, Sch 2, para 3 **Masterfoods (a division of Mars UK Ltd) v Wilson**, EAT [2007] ICR 370

Employee dismissed for misconduct — Tribunal finding dismissal inevitable despite flaw in disciplinary process — Whether dismissal fair — Employment Rights Act 1996, s 98A(2) (as inserted by Employment Act 2002, s 34) **Kelly-Madden v Manor Surgery**, EAT [2007] ICR 203

Employees made redundant following selection process — Employer providing employees with selection criteria only — Whether sufficient to comply with statutory dismissal procedure — Whether dismissals automatically unfair — Tribunal finding 100% chance of dismissal in any event — Whether decisions to dismiss not unreasonable — Employment Rights Act 1996, s 98A(1)(2) (as inserted by Employment Act 2002, s 34) — Employment Act 2002, Sch 2, Pt 1, Ch 1 **Alexander v Brigden Enterprises Ltd**, EAT [2006] ICR 1277

Reason for dismissal

Alternative ground

Breakdown in finance director's relationships with senior colleagues and external agencies — Whether "some other substantial reason" such as to justify dismissal — Dismissal procedurally unfair — Employee making unfounded attack on honesty and integrity of colleagues — Whether fairly conducted hearing would have resulted in dismissal — Whether tribunal entitled to find claimant contributed 100% to dismissal — Employment Rights Act 1996, s 98(1)(4) **Perkin v St George's Healthcare NHS Trust**, CA [2006] ICR 617

Chief executive of company dismissed on removal as director following takeover — Whether for "substantial reason" justifying dismissal — Employment Rights Act 1996, s 98(1)(b) **Cobley v Forward Technology Industries plc**, CA [2003] ICR 1050

Employees refusing to sign new contracts with restrictive covenant — Employers relying on "some other substantial reason" for dismissal — Whether reasonableness of covenant relevant — Employment Rights Act 1996, s 98(1)(4)
Willow Oak Developments Ltd (trading as Windsor Recruitment) v Silverwood, EAT [2006] ICR 55
Forshaw v Archcraft Ltd (Note), EAT [2006] ICR 70

Reasonableness of dismissal

Airport security guard dismissed following failure of security clearance — Whether dismissal for purpose of safeguarding national security — Whether necessary to consider reasonableness of dismissal — Employment Tribunals Act 1996, s 10(1) (as substituted by Employment Relations Act 1999, Sch 8, para 3) — Employment Rights Act 1996, s 98(4) — Human Rights Act 1998, s 3(1) **B v BAA plc**, EAT [2005] ICR 1530

Dismissal procedure *see also* **Contract of employment:** *Disciplinary proceedings*

Employee given 3 days' notice of hearing of unparticularised allegations of breach of trust — Whether procedure defective — Internal appeal restricted to demonstrating dismissal unreasonable — Whether capable of curing defective hearing — Whether dismissal unfair **Coxon v Rank Xerox (UK) Ltd**, EAT [2003] ICR 628

Procedural unfairness — Employee dismissed for redundancy without proper consultation — Tribunal finding dismissal inevitable regardless of consultation and applying statutory provision to hold dismissal fair — Whether provision retrospective — Whether applicable — Employment Rights Act 1996, s 98A(2) (as inserted by Employment Act 2002, s 34) **Mason v Governing Body of Ward End Primary School**, EAT [2006] ICR 1128

Misconduct

Applicant cautioned for act of gross indecency in public lavatory — Whether within right to respect for private life — Whether dismissal fair — Guidance on dealing with human rights points in unfair dismissal cases — Employment Rights Act 1996, s 98(4) — Human Rights Act 1998, s 3, Sch 1, Pt I, arts 8, 14 **X v Y**, EAT [2003] ICR 1138
CA [2004] ICR 1634

EMPLOYMENT—*continued*
Unfair dismissal—*continued*
Reasonableness of dismissal—continued
Misconduct—*continued*

Dismissal for reason relating to employee's conduct — Employer's investigation into alleged misconduct — Whether objective test applying to reasonableness of investigation — Employment Rights Act 1996, s 98(1)(2)(4) **J Sainsbury plc v Hitt**, CA [2003] ICR 111

Employee admitting misconduct — Employer's disciplinary procedure flawed — Whether "band of reasonable responses" test applicable — Employment Rights Act 1996, s 98(4) **Whitbread plc (trading as Whithead Medway Inns) v Hall**, CA [2001] ICR 699

Employee dismissed for failing to maintain proper financial records — Employee's conduct involving no dishonesty — Majority of tribunal of view conduct insufficiently serious to warrant dismissal — Whether applying correct test — Whether preferable to reserve decision where tribunal not unanimous **Anglian Home Improvements Ltd v Kelly,** CA [2005] ICR 242

Employee dismissed for taking time off without permission — Refusal of time off constituting racial victimisation — Decision to dismiss tainted with victimisation — Whether internal appeal rectifying defect in decision **Brown v TNT Express Worldwide (UK) Ltd,** CA [2001] ICR 182

Employee guilty of gross misconduct shortly after expiry of written warning for similar conduct — Employer taking account of disciplinary record when considering sanction — Employee dismissed whereas others with no disciplinary record receiving warnings — Whether dismissal unfair **Airbus UK Ltd v Webb,** EAT [2007] ICR 956

New terms of employment

Employer changing shift arrangements to include Sunday working following need to increase production — Employee unwilling to work Sundays on religious grounds rejecting alternative positions — Whether dismissal fair — Whether right to manifest religion engaged — Employment Rights Act 1996, s 98(1)(4) — Human Rights Act 1998, Sch 1, Pt 1, art 9 **Copsey v WBB Devon Clays Ltd,** CA [2005] ICR 1789

Some other substantial reason

Probation officer performing at fetish clubs and involved with sale of bondage products on internet — Whether within right to respect for private life — Whether dismissal fair — Employment Rights Act 1996, s 98(4) — Human Rights Act 1998, Sch 1, Pt I, arts 8, 10 **Pay v Lancashire Probation Service**, EAT [2004] ICR 187

Redundancy

Failure to consult employee prior to dismissal — Whether failure making no difference — Whether compensation limited to period during which consultation should have taken place — Whether claim of loss of pension appropriate — Employment Rights Act 1996, s 123(1) **Lambe v 186K Ltd,** CA [2005] ICR 307

Wages
Bonus

Employer declaring non-contractual bonus — Conditions imposed for payment in monthly instalments and to withhold payment in event of notice to terminate employment — Employee resigning — Whether constructive dismissal — Employer withholding bonus — Whether bonus "wages" unlawfully deducted — Employment Rights Act 1996, ss 13, 27(3) **Farrell Matthews & Weir v Hansen,** EAT [2005] ICR 509

Deductions see **Working time provisions:** *Paid annual leave*

National minimum wage

Accommodation provided by employer — Employer making deduction or requiring payment of sum for gas and electricity — Whether "in respect of provision of living accommodation" — Whether for employer's "own use and benefit" — Whether in respect of purchase of "services from employer" — Whether paid pursuant to requirement imposed by employer — Whether to be deducted before calculating minimum wage — National Minimum Wage Regulations 1999, regs 31(1)(h)(i), 32(1)(b), 33(a), 34(1)(c), 35(a)(e) **Revenue and Customs Comrs v Leisure Services Ltd,** EAT [2006] ICR 1094

Accommodation provided by employer — Employer making deduction or requiring payment of sum for gas and electricity — Whether "in respect of provision of living accommodation" — Whether for employer's "own use and benefit" — Whether to be deducted before calculating minimum wage — National Minimum Wage Regulations 1999, regs 31(1)(i), 32(1)(b) **Revenue and Customs Comrs v Leisure Employment Services Ltd,** CA [2007] ICR 1056

EMPLOYMENT—*continued*

Wages—*continued*

National minimum wage—continued

Agency operating 24-hour booking service diverting calls after office hours to employees at home — Whether employees "working" throughout whole shift or only when answering calls — National Minimum Wage Regulations 1999, reg 15(1)
British Nursing Association v Inland Revenue, CA [2003] ICR 19

Carer on call during 72-hour period living with charge — Daily average hours of active caring assessed at under 7 per day — Whether engaged on "time work" or "unmeasured work" — National Minimum Wage Regulations 1999, regs 3, 6, 27, 28(1)
Walton v Independent Living Organisation Ltd, EAT [2002] ICR 1406
CA [2003] ICR 688

Enforcement notice served on employer for failure to pay minimum wage to former employees — Notice not relating to any reference period ending on or after date of notice — Whether valid — National Minimum Wage Act 1998, s 19(1)(2) **Inland Revenue Comrs v Bebb Travel plc,**
EAT [2003] ICR 201
CA [2003] ICR 1271

Worker

Courier providing services to delivery company — Whether performing "personally . . . work or services" — Whether carrying on "business undertaking" — Whether courier "worker" — Whether "home worker" — National Minimum Wage Act 1998, ss 28(1), 35(2), 54(3)
James v Redcats (Brands) Ltd, EAT [2007] ICR 1006

Sub-postmaster providing premises equipment and staff — No obligation to attend personally — Whether performing "personally any work or services" — Whether Post Office "client or customer" — Whether sub-postmaster "worker" — Whether "home worker" — Whether "employee" — Employment Rights Act 1996, s 230(1)(3) — National Minimum Wage Act 1998, ss 35(2), 54(3) — Working Time Regulations 1998, reg 2(1)
Wolstenholme v Post Office Ltd, EAT [2003] ICR 546

Working time provisions

Annual leave

Claimants paid for notional hours allotted tasks deemed to take — Whether employed for "fixed number of hours" — Whether "normal working hours" for purpose of calculating "a week's pay" — Employment Rights Act 1996, s 234(1) — Working Time Regulations 1998, reg 16
Sanderson v Exel Management Services Ltd, EAT [2006] ICR 1337

Employee contracted to work 39-hour week with overtime if required — Employee's hours averaging 58 per week — Payment for annual leave based on 39-hour week — Whether payment at "rate of a week's pay" — Employment Rights Act 1996, ss 221, 234 — Working Time Regulations 1998, reg 16 — Council Directive 93/104/EC, art 7
Bamsey v Albon Engineering and Manufacturing plc, EAT [2003] ICR 1224
CA [2004] ICR 1083

Paper boy aged 15 claiming holiday pay — Whether "worker" — Whether entitled to paid leave — Children and Young Persons Act 1933, ss 18 (as amended by Children (Protection at Work) Regulations 1998, reg 2), 30(1) — Working Time Regulations 1998, regs 2(1), 13 — Council Directive 94/33/EC, art 11 **Addison (trading as Brayton News) v Ashby,**
EAT [2003] ICR 667

Waitress with no regular hours working as required — Whether continuously employed for 13 weeks — Whether entitled to annual leave — Working Time Regulations 1998, reg 13(7)(8)
Voteforce Associates Ltd v Quinn, EAT [2002] ICR 1

Excluded sectors

Activities connected with provision of meals to aircraft between flights — Whether involving "need for continuity of service" — Whether routine increase in activity "surge of activity" — Whether rest break provision excluded — Whether period when employees not doing work but at employer's disposal "rest break" — Working Time Regulations 1998, regs 12(1)(3), 21(c)(d)
Gallagher v Alpha Catering Services Ltd (trading as Alpha Flight Services),
EAT [2004] ICR 1489
CA [2005] ICR 673

Exclusion

Collective agreement providing arbitration for disputes — Local agreement for shift system expressly excluding statutory regulation of rest periods — Arbitration award in favour of employers' proposals for new system — Whether award "collective agreement" — Whether statutory regulation of rest periods excluded — Trade Union and Labour Relations (Consolidation) Act 1992, s 178 — Working Time Regulations 1998, regs 2(1), 10(1), 23
Prison Service v Bewley, EAT [2004] ICR 422

EMPLOYMENT—*continued*
Working time provisions—*continued*
Exclusion—continued

Emergency ambulance workers — Whether excluded by exemption for "public service activities" or "road . . . transport" — Collective agreement providing for average working week in excess of maximum weekly hours — Whether consent by workers to work more than maximum — Council Directive 89/391/EEC, art 2(2) — Council Directive 93/104/EC, arts 1(3), 6, 18(1)(b)(i) **Pfeiffer v Deutsches Rotes Kreuz, Kreisverband Waldshut eV (Cases C-397–403/01)**, ECJ [2005] ICR 1307

Maximum weekly hours

On-call duty by hospital doctors — Doctors permitted to sleep at hospital during periods of inactivity — Whether totality of on-call time "working time" — Derogations from minimum daily rest periods — Requirements to be met by compensatory rest periods — Council Directive 93/104/EC, arts 2(1), 3, 17(2) **Landeshauptstadt Kiel v Jaeger (Case C-151/02)**, ECJ [2004] ICR 1528

Primary health care doctors — Whether covered by Community provisions — Whether time spent on call to be counted as working time, night work and shift work — Whether trade union agreement to derogate from maximum working time constituting consent by worker — Council Directive 89/391/EEC, art 2 — Council Directive 93/104/EC, arts 2, 6, 18(1)(b)(i) **Sindicato de Médicos de Asistencia Pública (SIMAP) v Consellería de Sanidad y Consumo de la Generalidad Valenciana (Case C-303/98)**, ECJ [2001] ICR 1116

Paid annual leave

Claims for payment in respect of entitlement in two leave years — Whether failures to pay "series of deductions" — Whether claim in respect of earlier period out of time — Employee taking fewer days leave than entitlement — Whether entitled to payment for full entitlement — Employment Rights Act 1996, ss 23(2)(3), 27(1) — Working Time Regulations 1998, regs 13(1)(9), 16(1), 30(2) **List Design Group Ltd v Douglas**, EAT [2002] ICR 686

Employee absent from work through sickness — Whether entitled to paid annual leave during period of absence — Whether holiday pay recoverable as unlawful deduction of wages — Employment Rights Act 1996, ss 13, 23, 205(2) — Working Time Regulations 1998, regs 13, 14 (as amended by Working Time (Amendment) Regulations 2001, reg 2), 30 **Inland Revenue Comrs v Ainsworth**, CA [2005] ICR 1149

Employee absent from work through sickness — Whether "worker" — Whether entitled to paid annual leave during period of absence — Working Time Regulations 1998, regs 2(1), 13, 14, 16 **Kigass Aero Components Ltd v Brown**, EAT [2002] ICR 697

Employee paid basic wage and commission — Claim for holiday pay at rate including commission — Whether remuneration varying with "amount of work done" — Employment Rights Act 1996, s 221 **Evans v The Malley Organisation (trading as First Business Support)**, CA [2003] ICR 432

Employee's hourly rate of pay including element of holiday pay — Whether void — Whether employer entitled to set-off — Working Time Regulations 1998, regs 13(9)(b), 16(1)(5), 35(1) — Council Directive 93/104/EC, art 7 **MPB Structures Ltd v Munro**, Ct of Sess [2004] ICR 430

Employees contracted to work shifts of varying length within six-monthly roster — Shift pay calculated in accordance with collective agreements — Calculation of weekly amount involving payment for 48 working weeks being spread over 52 weeks — Resulting sum paid whether employee working or on holiday — Whether underpayment of shift element of pay for statutory holiday period — Employment Rights Act 1996, s 222 — Working Time Regulations 1998, reg 16(1) **British Airways plc v Noble**, CA [2006] ICR 1227

Employees' hourly rate of pay including element of holiday pay — Whether void — Whether employers entitled to set-off — Working Time Regulations 1998, regs 13(9)(b), 16(1)(5), 35(1) **Marshalls Clay Products Ltd v Caulfield**, EAT [2004] ICR 436

Employees' hourly rate of pay including element of holiday pay — Whether void — Whether Employment Appeal Tribunal bound by Court of Session decision — Working Time Regulations 1998, reg 16(1)(5) — Council Directive 93/104/EC, art 7 **Marshalls Clay Products Ltd v Caulfield**, CA [2004] ICR 1502

EMPLOYMENT—*continued*

Working time provisions—*continued*

Paid annual leave—continued

Employees paid at hourly rate — Employer claiming rate including element of holiday pay — Employees unaware of such element — Whether relevant — Working Time Regulations 1998, reg 16 **Gridquest Ltd (trading as Select Employment) v Blackburn,** EAT [2002] ICR 682
CA [2002] ICR 1206

Employees' pay expressed to include element of holiday pay — Whether genuine payment for holidays — Working Time Regulations 1998, regs 13(1) (as substituted by Working Time (Amendment) Regulations 2001, reg 2), 16(1) **Smith v A J Morrisroes & Sons Ltd,**
EAT [2005] ICR 596

Employer denying entitlement to paid leave during employment — Applicant complaining after termination of employment of unlawful deductions in respect of leave entitlement — Whether series of deductions ending with failure to make payment in lieu of outstanding leave on termination — Employment Rights Act 1996, ss 13(1), 23, 27(1) — Working Time Regulations 1998, regs 13(1), 14(1)(2), 16(1) **Canada Life Ltd v Gray,** EAT [2004] ICR 673

Entitlement to paid annual leave conditional on minimum period of continuous employment — Whether contrary to Community law — Working Time Regulations 1998, reg 13(7) — Council Directive 93/104/EC, art 7(1)
R (Broadcasting, Entertainment, Cinematographic and Theatre Union) v Secretary of State for Trade and Industry (Case C-173/99), ECJ [2001] ICR 1152

Leave not taken in year — Whether carried over to following year — Whether payment in lieu permissible for leave carried over — Council Directive 93/104/EC, art 7(1)(2)
Federatie Nederlandse Vakbeweging v Netherlands State (Case C-124/05),
ECJ [2006] ICR 962

Rolled-up holiday pay — Whether compatible with Community law — Working Time Regulations 1998, reg 16 — Council Directive 93/104/EC, art 7
Robinson-Steele v RD Retail Services Ltd (Cases C-131 and 257/04), ECJ [2006] ICR 932

Rest periods

Guidelines requiring employers merely to ensure workers not prevented from taking rest — Regulations permitting exemption from maximum weekly hours and night work where part only of work unmeasured or determinable by worker — Whether breaches of Working Time Directive — Working Time Regulations 1998, reg 20(2) (as inserted by Working Time Regulations 1999, reg 4) — Council Directive 93/104/EC, arts 3, 5, 17(1)
Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland
(Case C-484/04), ECJ [2007] ICR 592

Residential home manager on 24-hour call — Manager occupying flat in home — Whether time on call but not actually working "rest period" — Whether denied periods of daily rest and rest breaks — Manager's contract providing annual salary for 4 days per week on call — Whether "salaried hours" or "unmeasured work" — Working Time Regulations 1998, regs 2(1), 10, 12 — National Minimum Wage Regulations 1999, reg 4
MacCartney v Oversley House Management, EAT [2006] ICR 510

Worker

Individual building worker providing his services under subcontract — Specific condition for subcontractor to provide sufficient labour to maintain work in progress — Whether performing "personally . . . work or services" — Working Time Regulations 1998, reg 2(1)(b)
Redrow Homes (Yorkshire) Ltd v Wright, CA [2004] ICR 1126

Individual building worker providing his services under subcontract — Whether performing "personally . . . work or services" — Whether carrying on "business undertaking" — Whether "worker" — Working Time Regulations 1998, reg 2(1)(b)
Byrne Bros (Formwork) Ltd v Baird, EAT [2002] ICR 667

Wrongful dismissal *see also* **Unfair dismissal:** *Compensation*

Damages see also **Contract of employment:** *Breach of contract*

Employee awarded compensation for unfair dismissal — Subsequent claim of wrongful dismissal based on manner of dismissal — Whether damages recoverable **Johnson v Unisys Ltd,**
HL(E) [2001] ICR 480

Employee with 11 months' service summarily dismissed — Breach depriving employee of right to claim unfair dismissal — Whether damages recoverable in respect of loss of right
Harper v Virgin Net Ltd (Note), CA [2005] ICR 921

EMPLOYMENT—*continued*

Wrongful dismissal—*continued*

Damages—continued

Employee with 11 months' service summarily dismissed in breach of employers' disciplinary procedure — Breach depriving employee of right to claim unfair dismissal — Whether damages recoverable for lost chance — Whether damages recoverable for loss of opportunity to remain in employment **Wise Group v Mitchell,** EAT [2005] ICR 896

ESTOPPEL *see also* TRUSTS: **Pension scheme**

Per rem judicatam

Cause of action estoppel

Applicant withdrawing employment tribunal complaint with intention of replacing it with fresh complaint — Complaint dismissed "on withdrawal" — Applicant presenting second complaint on same facts against original and second respondent — Whether estopped from pursuing second complaint **Ako v Rothschild Asset Management Ltd,** CA [2002] ICR 899

Claim for wrongful dismissal upheld by employment tribunal — Tribunal's award of damages capped at statutory maximum — Claimant pursuing High Court action for wrongful dismissal to recover excess — Whether res judicata **Fraser v HLMAD Ltd,** CA [2006] ICR 1395

Issue estoppel

Employee's disagreement with employer over safety procedures disrupting working relationship — Employee dismissed — Complaint of unfair dismissal on procedural grounds upheld — Industrial tribunal awarding no compensation on ground of employee's 100% contribution to dismissal — Employee's action for malicious falsehood and breach of contract against employer raising safety issue — Whether action barred by issue estoppel
Friend v Civil Aviation Authority, CA [2002] ICR 525

EUROPEAN COMMUNITY

Council Directive

Implementation

Directive incorrectly transposed into national law — Provision of Directive sufficiently precise and unconditional to have direct effect against state — Whether capable of being relied on against individual — Duty of national court in applying national law if possible to attain objective of provision — Council Directive 93/104/EC, art 6(2)
Pfeiffer v Deutsches Rotes Kreuz, Kreisverband Waldshut eV (Cases C-397–403/01), ECJ [2005] ICR 1307

Free competition

Restriction or distortion of competition

Compulsory affiliation to sectoral pension scheme established by collective agreement — Pension fund having exclusive right to manage scheme — Whether fund "undertaking" — Whether infringing Community competition law — EC Treaty, arts 3(g), 5, 85, 86, 90
Brentjens' Handelsonderneming BV v Stichting Bedrijfspensionen voor de Handel in Bedrijfspensionen voor de Handel in Bouwmaterialen (Cases C-115–117/97), ECJ [2001] ICR 774

Lease requiring tied tenants to buy beer from specified brewer at list prices — Whether contrary to prohibition on anti-competitive agreements and practices — Ruling by Commission on similar agreement — Whether duty of sincere co-operation requiring national court to accept Commission findings — EC Treaty, arts 10 EC, 81 EC
Crehan v Inntrepreneur Pub Co (CPC) (Office of Fair Trade intervening), HL(E) [2006] ICR 1344

Parallel imports of medicinal products into member state by wholesalers in other states — Manufacturer's restriction of deliveries to wholesalers — Allegation of export ban by manufacturer — Whether wholesalers acquiescing in manufacturer's conduct by maintaining commercial relations — EC Treaty, art 85(1)
Bayer v Commission of the European Communities (Case T-41/96), CFI [2001] ICR 735

Services

National obligations imposed on construction industry employers — Requirements as to minimum wage, other remuneration and labour documents — Whether enforceable against undertaking established in another member state doing temporary work in host state — Whether material that obligations imposed by public order legislation — EC Treaty, arts 59, 60
Criminal proceedings against Arblade (Case C-369 and 376/96), ECJ [2001] ICR 434

EUROPEAN COMMUNITY—*continued*

Freedom of establishment

Profession

Application to carry on professional activity in another member state — Authorisation refused because applicant's diploma not within Directive on mutual recognition of diplomas and certificates — Whether obligation to consider and evaluate applicant's qualifications and experience — EC Treaty, art 43 EC (formerly art 52)
Conseil National de l'Ordre des Architectes v Dreessen (Case C-31/00), ECJ [2002] ICR 1227

Freedom of movement

Citizenship of European Union

Unemployment benefit for persons seeking first employment — National refused benefit on ground that secondary education completed in another member state — Whether unlawful as contrary to right of free movement — EC Treaty, art 8a(1) (art 18(1) EC)
D'Hoop v Office national de l'emploi (Case C-224/98), ECJ [2004] ICR 137

Right to reside

Family member of Turkish migrant worker over 21 and no longer dependent on parents — Whether retaining entitlement to reside and work in host state — Whether expulsion following term of imprisonment precluded — Whether more favourable treatment than EC nationals — Association Council Decision No 1/80, art 7 — EEC-Turkey Association Agreement (1963), Additional Protocol (1970), art 59 **Derin v Landkreis Darmstadt-Dieburg (Case C-325/05),** ECJ [2007] ICR 1706

Rights of entry and residence

Children of migrant worker — Right of continued residence for educational purposes following divorce or termination of worker status — Whether primary parent carer having derived right of residence — Whether European Union citizen having right of residence regardless of worker status — EC Treaty, art 18(1) EC — Council Directive 90/364/EEC, art 1(1) — Council Regulation (EEC) No 1612/68, art 12
Baumbast v Secretary of State for the Home Department (Case C-413/99), ECJ [2003] ICR 1347

Right to work

Turkish national entering United Kingdom as student with right to work part-time — Application for leave to remain as worker — Whether student working part-time "worker" — Whether entitled to work permit — EEC-Turkey Association Agreement, art 2(1) — Association Council Decision No 1/80, art 6(1)
R (Ozturk) v Secretary of State for the Home Department, Newman J [2006] ICR 178

Turkish nationals entering United Kingdom as student with right to work part-time and as au pair — Applications for leave to remain as workers — Whether "workers" — Whether "belonging to the labour force" —Association Council Decision No 1/80, art 6(1)
R (Ozturk) v Secretary of State for the Home Department, CA [2006] ICR 1314
R (Payir) v Secretary of State for the Home Department, CA [2006] ICR 1314

Social security

Unemployment benefit — Entitlement conditional on habitual residence in member state — Whether contrary to freedom of movement and residence — Whether justifiable — EC Treaty, art 18 EC **De Cuyper v Office national de l'emploi (Case C-406/04),** ECJ [2007] ICR 317

Social security

Equal treatment provisions for men and women

Children residing with father for part of each week — Mother receiving child benefit — Father's jobseeker's allowance not including amount for children — Entitlement dependent on receipt of child benefit — Whether discriminatory — Whether jobseeker's allowance providing protection against risk of unemployment — Jobseekers Act 1995, ss 1, 3 — Jobseeker's Allowance Regulations 1996, regs 77(1), 83(b) — Council Directive 79/7/EEC, art 3(1)
Hockenjos v Secretary of State for Social Security, CA [2001] ICR 966

Free movement of workers

Jobseeker's allowance — Applicant seeking employment in United Kingdom after brief employment many years previously — Entitlement dependent on applicant being "habitually resident" in United Kingdom — Whether discriminatory effect of habitual residence condition justified — Jobseeker's Allowance Regulations 1996, reg 85(4)
Collins v Secretary of State for Work and Pensions, CA [2006] ICR 1033

EUROPEAN COMMUNITY—*continued*
  Social security—*continued*
    Free movement of workers—continued
      Jobseeker's allowance — Entitlement dependent on applicant being "worker" or having right of residence under Community enactments or having habitual residence — Eligibility of person seeking employment in United Kingdom after brief employment there many years previously — Whether "worker" — Whether having right of residence — Whether habitual residence condition contrary to non-discrimination principle — Jobseeker's Allowance Regulations 1996, reg 85(4) — EC Treaty, art 48(2) (after amendment, art 39(2) EC) — Council Directive 68/360/EEC, arts 4, 8 — Council Regulation (EEC) No 1612/68 (as amended), art 7(2)
        Collins v Secretary of State for Work and Pensions (Case C-138/02), ECJ [2005] ICR 37

    Student
      Subsistence allowance payable to resident non-national only if worker — Application by resident non-national student refused — Whether discrimination contrary to Community law — Effect of citizenship of European Union — EC Treaty, arts 6, 8, 8a — Council Directive 93/96/EEC, art 1 **Grzelczyk v Centre public d'aide sociale Ottignies-Louvain-la-Neuve** (Case C-184/99), ECJ [2002] ICR 566

EVIDENCE
  Expert evidence
    Immunity from suit
      Disciplinary proceedings brought against medical practitioner for giving flawed but honest expert evidence — Whether witness's immunity from suit extending to disciplinary proceedings
        Meadow v General Medical Council, CA [2007] ICR 701

  Privilege
    "Without prejudice" discussions
      Negotiations between employer and employee over disputed employment terms — Whether admissible in claim for breach of contract in relation to disputed terms
        Barnetson v Framlington Group Ltd, CA [2007] ICR 1439

FACTORY
  Asbestos dust
    Protection
      Employee mixing for one hour weekly asbestos flock to apply to presses — Whether process to which regulations applicable — Whether carried on "occasionally only" — Asbestos Industry Regulations 1931, reg 2 **Jeromson v Shell Tankers (UK) Ltd**, CA [2001] ICR 1223

FATAL ACCIDENTS ACTS *see also* NEGLIGENCE: **Causation:** *Suicide*
  Damages
    Widow's dependency
      Employee dismissed while suffering from mesothelioma caused by tortious exposure to asbestos — Payment due from employer's provident fund on termination of employment paid after employee's death — Widow claiming dependency including enhanced payments due from fund had employee continued to work to expected date of retirement — Whether recoverable — Whether payment made to estate to be taken into account — Fatal Accidents Act 1976, s 4 (as substituted by Administration of Justice Act 1982, s 3(1)) **McIntyre v Harland & Wolff plc**, CA [2006] ICR 1222

HEALTH AND SAFETY
  Employer's duty
    Extent
      Duty under EC Directive to ensure workers' safety and health in all work aspects — UK legislation imposing duty "so far as is reasonably practicable" — Whether Directive requiring no-fault liability — Whether UK legislation contrary to Directive — Health and Safety at Work etc Act 1974, s 2(1) — Council Directive 89/391/EEC, art 5
    Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland (Case C-127/05), ECJ [2007] ICR 1393

    Hazardous substances
      Employee developing allergy from using powdered latex gloves — Employer supplying vinyl gloves following serious reaction — Employee later suffering anaphylactic shock from inadvertent contact with latex — Whether absolute duty on employer to prevent or control exposure to substance hazardous to health — Control of Substances Hazardous to Health Regulations 1988, reg 7(1)(7) — Control of Substances Hazardous to Health Regulations 1994, reg 7(1)(11) **Dugmore v Swansea NHS Trust**, CA [2003] ICR 574

HEALTH AND SAFETY—*continued*

Employer's duty—*continued*

Manual handling operations

Ambulance technician injured carrying patient downstairs — Use of fire brigade to remove patient through window only alternative — Whether "appropriate" measure to reduce risk to ambulance crew — Manual Handling Operations Regulations 1992, reg 4(1) — Council Directive 90/269/EEC, art 3 **King v Sussex Ambulance Service NHS Trust,** CA [2002] ICR 1413

Claimant employed by cleaning company to work at bus station — Claimant slipping while spreading grit over ice-covered yard — Whether manual handling operation — Whether employer in breach of duty to avoid risk of injury — Whether bus company having any control over claimant's workplace and requirement to keep free from ice — Manual Handling Operations Regulations 1992, regs 2, 4(1) — Workplace (Health, Safety and Welfare) Regulations 1992, regs 4, 12(3) **King v RCO Support Services Ltd,** CA [2001] ICR 608

Employer failing to train employee in accordance with programme designed to increase awareness of risk in manual handling — Employee carrying load injured twisting in response to call from colleague — Whether employer in breach of duty to take appropriate steps to reduce risk of injury to lowest level reasonably practicable — Manual Handling Operations Regulations 1992, reg 4(1) **O'Neill v DSG Retail Ltd,** CA [2003] ICR 222

Employer's liability

Personal protective equipment

Claimant injured when scaffolding tower provided by employer upset by deliberate act of fellow employee — Whether employer's duty to provide suitable and stable equipment to be assessed by reference to foreseeable risks — Whether tower safe "for any person at work there" — Provision and Use of Work Equipment Regulations 1992, regs 5, 20 — Construction (Health, Safety and Welfare) Regulations 1996, reg 5 **Horton v Taplin Contracts Ltd,** CA [2003] ICR 179

Safety boots provided to protect employee against injury from heavy, sharp or hard objects — Employee suffering frostbite while working outside in extreme weather conditions — Whether breach of statutory duty — Personal Protective Equipment at Work Regulations 1992, reg 7(1) **Fytche v Wincanton Logistics plc,** CA [2003] ICR 1582
HL(E) [2004] ICR 975

Slippery floor

Care assistant slipping on pool of urine on floor — Floor frequently wet with urine — Whether breach of duty to ensure surface of floor suitable for purpose — Contributory negligence — Workplace (Health, Safety and Welfare) Regulations 1992, reg 12 **Ellis v Bristol City Council,** CA [2007] ICR 1614

Suitability of equipment

Employee injured descending by ladder from top bunk in sleeping quarters — Ladder not correctly replaced within retaining brackets giving way under employee's weight — Whether "suitable" for purpose — No evidence of previous accidents — Whether accident reasonably foreseeable — Whether "necessary" for ladder to be fixed to bunks — Provision and Use of Work Equipment Regulations 1998, regs 4, 20 **Robb v Salamis (M & I) Ltd,** HL(Sc) [2007] ICR 175

Woodworking machinery

Refugee with language difficulties misrepresenting experience — Employed as circular saw operator — Injured three weeks later operating saw from wrong position — Whether insufficiently instructed and supervised — Whether breach of statutory duty — Whether employer negligent — Woodworking Machines Regulations 1974, regs 5(1), 13, 16(3) **Tasci v Pekalp of London Ltd,** CA [2001] ICR 633

Work equipment

Mechanic employed by first defendant working on van owned by second defendant — Wheel bolt shearing causing mechanic to sustain injury — Whether "work equipment" — Whether defendants liable for failure to maintain work equipment — Provision and Use of Work Equipment Regulations 1992, regs 2(1), 6(1) **Hammond v Comr of Police of the Metropolis,** CA [2004] ICR 1467

Office premises let to employers in building in multiple occupation — Employee leaving building after work injured due to defect in lift — Whether lift "work equipment" — Whether used by employee "at work" — Whether employers in breach of statutory duty — Provision and Use of Work Equipment Regulations 1998, regs 2, 3(2), 5(1) **PRP Architects v Reid,** CA [2007] ICR 78

HEALTH AND SAFETY—*continued*

Employer's liability—*continued*

Workplace obstruction

Cleaner tripping over obvious obstruction on classroom floor — Whether employer in breach of duty to keep floor free from article which might cause person to fall — Workplace (Health, Safety and Welfare) Regulations 1992, reg 12(3) **Burgess v Plymouth City Council,** CA [2006] ICR 579

Employee injured tripping over frame stored with feet protruding — Employer in breach of statutory duty — Whether finding of 90% contributory negligence sustainable — Law Reform (Contributory Negligence) Act 1945, s 1(1) — Workplace (Health, Safety and Welfare) Regulations 1992, reg 12(3) **Anderson v Newham College of Further Education,** CA [2003] ICR 212

Inspector

Powers

Inspector submitting written questions to health and safety manager of company under investigation — Whether inspector's powers limited to face to face questioning — Health and Safety at Work etc Act 1974, s 20(2)(j) **R (Wandsworth London Borough Council) v South Western Magistrates' Court,** DC [2003] ICR 1287

Prohibition notice

Activities

Notice following major accident prohibiting provision of railway infrastructure — Infrastructure not in use following accident save for recovery operations — Whether "activities" being carried on — Whether power to issue prohibition notice while activities temporarily interrupted — Health and Safety at Work etc Act 1974, s 22 (as amended by Consumer Protection Act 1987, Sch 3, para 2) **Railtrack plc v Smallwood,** Sullivan J [2001] ICR 714

Statutory offence

Burden of proof

Employer's duty not to expose non employees to risk to health or safety — Burden of showing not reasonably practicable to do more on employer — Whether compatible with presumption of innocence — Health and Safety at Work etc Act 1974, ss 3(1), 33(1)(a), 40 — Human Rights Act 1998, Sch 1, Pt I, art 6(2) **R v Davies (David Janway),** CA [2003] ICR 586

Employer's liability

Fatal train derailment caused by track disintegrating — Company responsible for inspecting track pleading guilty to failing to discharge duty not to expose non-employees to risks to health and safety — Judge fining company £10m — Whether fine excessive — Guidelines on sentencing companies where employees or non-employees put at risk — Health and Safety at Work etc Act 1974, s 3(1) **R v Balfour Beatty Rail Infrastructure Services Ltd,** CA [2007] ICR 354

Manufacturer

Machinery causing fatality — Modification made following prohibition notice — Whether Health and Safety Executive required to comply with Community provision for machinery liable to endanger safety before prosecuting — Whether appropriate to prosecute under 1974 Act when Regulations providing for specific offence — Health and Safety at Work etc Act 1974, s 6 (as amended by Consumer Protection Act 1987, s 36, Sch 3, para 2) — Interpretation Act 1978, s 18 — Supply of Machinery (Safety) Regulations 1992, reg 29, Sch 6, para 7 — Council Directive 98/37/EC, art 7 **R (Junttan Oy) v Bristol Magistrates' Court,** DC [2002] ICR 1523
HL(E) [2003] ICR 1475

Reasonably practicable

Employer charged with failure to ensure employees' health and safety "so far as is reasonably practicable" — Employer contending accident caused by employees' failure to follow instructions — Whether evidence as to foreseeability of employees so doing admissible — Whether reasonable practicability "defence" — Whether employer precluded from relying on employees' acts or default — Health and Safety at Work etc Act 1974, ss 2(1), 40 — Management of Health and Safety at Work Regulations 1999, reg 21 **R v HTM Ltd,** CA [2006] ICR 1383

HUMAN RIGHTS

Declaration of incompatibility

Court see INDUSTRIAL RELATIONS: **Employment Appeal Tribunal:** *Jurisdiction*

Public authority

Retrospectivity

Complaint of sex discrimination in relation to election to Scottish Parliament — Complaint preceding coming into force of statute — Whether complainant entitled to rely on statute on appeal — Human Rights Act 1998, ss 7(1)(b), 22(4) **Secretary of State for Scotland v Mann,** EAT(Sc) [2001] ICR 1005

HUMAN RIGHTS—*continued*

Right of respect for private life *see* EMPLOYMENT: **Unfair dismissal:** *Reasonableness of dismissal*

Right to fair trial

Right against self-incrimination see COMPETITION: **Investigatory powers:** *Compatibility with Convention rights*

Right to peaceful enjoyment of possessions

Medical practitioner

General practitioner unlawfully suspended from performers list — Suspension depriving practitioner of right to practise within NHS — Whether inclusion on list "possession" — Human Rights Act 1998, Sch 1, Pt II, art 1 — National Health Service (Performers Lists) Regulations 2004, reg 13 — Primary Medical Services (Sales of Goodwill and Restrictions on Sub-contracting) Regulations 2004, reg 3
R (Malik) v Waltham Forest NHS Primary Care Trust, CA [2007] ICR 1101

Right to respect for private life

Commercial documents see COMPETITION: **Investigatory powers:** *Compatibility with Convention rights*

IMMIGRATION

Limited leave to enter

Application to extend stay

Leave to enter granted to Turkish au pair — Au pair wishing to continue working for same family — Extension of stay sought — Whether au pair "worker" — Whether entitled to renewal of permit — Statement of Changes in Immigration Rules (HC 395), Pt 4, rr 92–94, 322(1) — Association Council Decision No 1/80, art 6(1)
R (Payir) v Secretary of State for the Home Department, Stanley Burnton J [2006] ICR 188

INDUSTRIAL RELATIONS

Consultation and information

Pre-existing arrangements

Collective agreements with trade unions — Majority but not all employees union members — Whether agreements covering all employees — Whether approved by employees — Information and Consultation of Employees Regulations 2004, reg 8(1)
Moray Council v Stewart, EAT(Sc) [2006] ICR 1253

Employment Appeal Tribunal

Appeal from see also DAMAGES: **Earnings, loss of:** *Future earnings*

Appeal tribunal dismissing appeal on ex parte preliminary hearing — Court of Appeal finding grounds of appeal having some prospect of success — Whether appropriate to remit for full appeal tribunal hearing **Lambe v 186K Ltd,** CA [2005] ICR 307

Appellants seeking to pursue ground of appeal not in appeal notice or in issue in appeal tribunal — Whether appeal restricted to reviewing decision of employment tribunal — Whether decision of appeal tribunal relevant — Whether appellants to be allowed to take new ground — Employment Tribunals Act 1996, s 37(1) **Gover v Propertycare Ltd,** CA [2006] ICR 1073

Appeal to

Appeal documents sent by fax on last day for entering appeal — Whether transmission to be completed by 4 p m **Woodward v Abbey National plc (No 2),** EAT [2005] ICR 1702

Appeal solely on ground of unreasonable delay in promulgation of employment tribunal's decision — Whether constituting independent ground of appeal — Whether limitation of appeal to questions of law incompatible with right to fair hearing — Employment Tribunals Act 1996, s 21(1) — Convention for the Protection of Human Rights and Fundamental Freedoms (1953), art 6(1) **Connex South Eastern Ltd v Bangs,** CA [2005] ICR 763

Application to amend notice of appeal — Delay in making application — Whether amendment to be allowed — Relevant factors — Employment Appeal Tribunals Rules 1993, r 2A (as inserted by Employment Appeal Tribunal (Amendment) Rules 2004, r 3) **Khudados v Leggate,** EAT [2005] ICR 1013

Employment tribunal chairman refusing to recuse himself on ground of adverse comments about applicant in earlier case — Complaint dismissed and costs awarded against applicant — Whether appropriate for appeal tribunal to decline jurisdiction to hear appeal alleging bias against chairman — Whether award of costs proper
Lodwick v Southwark London Borough Council, CA [2004] ICR 884

INDUSTRIAL RELATIONS—*continued*

Employment Appeal Tribunal—*continued*

Appeal to—*continued*

Party appealing more than 42 days after employment tribunal sending decision — Whether time running from date decision sent or date received — Whether out of time — Whether extension to be granted — Employment Appeal Tribunal Rules 1993, Sch 1, r 3(3) (as substituted by Employment Appeal Tribunal (Amendment) Rules 2001, r 3) **Sian v Abbey National plc,**
EAT [2004] ICR 55

Party filing notice of appeal more than 42 days after employment tribunal posting reasons — Whether time running from date decision sent or date received — Whether notice out of time — Interpretation Act 1978, s 7 — Employment Appeal Tribunal Rules 1993, Sch 1, r 3(3) as substituted by Employment Appeal Tribunal (Amendment) Rules 2001, r 3)
Gdynia America Shipping Lines (London) Ltd v Chelminski, CA [2004] ICR 1523

Bias

Part-time tribunal judge appearing before tribunal as counsel — Whether possibility of bias — Whether tribunal "impartial" — Human Rights Act 1998, Sch 1, art 6(1)
Lawal v Northern Spirit Ltd, EAT [2002] ICR 486
CA [2002] ICR 1507
HL(E) [2003] ICR 856

Constitution

Parties consenting to hearing of appeal by judge and one appointed member — Appellant employee withdrawing consent on discovering appointed member employers' representative — Whether consent valid — Whether appeal tribunal having jurisdiction to continue — Employment Tribunals Act 1996, s 28(2)(3) **de Haney v Brent MIND,** CA [2004] ICR 348

Jurisdiction see also **Employment tribunals:** *Procedure*

Appeal tribunal faced with inadequate extended reasons but no challenge to adequacy in notice of appeal — Whether appeal tribunal obliged to deal with notice of appeal as drafted — Whether permissible to refer to documents for explanation of tribunal's decision — Whether jurisdiction to remit for clarification of reasons — Employment Tribunals Act 1996, s 35(1)(b)
Tran v Greenwich Vietnam Community Project, CA [2002] ICR 1101

Compatibility of disability discrimination provision with complainant's human rights — Whether appeal tribunal "court" for purpose of determining compatibility — Disability Discrimination Act 1995, s 7(1) (as amended by Disability Discrimination (Exception for Small Employers) Order 1998, art 2) — Human Rights Act 1998, s 4(5)
Whittaker v P & D Watson (trading as P & M Watson Haulage),
EAT [2002] ICR 1244

Procedure see also EMPLOYMENT: **Unfair dismissal:** *Constructive dismissal*

Appeal tribunal on preliminary hearing allowing appeal to proceed on limited grounds — Whether appeal tribunal on substantive hearing restricted to limited grounds — Employment tribunal dismissing race discrimination complaint — Whether required to make findings on circumstantial evidence **Miriki v General Council of the Bar,** CA [2002] ICR 505

Appeal tribunal on preliminary hearing allowing appeal to proceed on 2 grounds and dismissing 3 others — All 5 grounds relating to single issue on which case based — Whether order appropriate **Vincent v M J Gallagher Contractors Ltd,** CA [2003] ICR 1244

Appeals and interim applications — Inspection of register — Documents for use at hearing — Evidence — Case management — Complaints about tribunal hearings — Skeleton arguments — Citation of authorities — Disposal of appeals by consent — Failure to present response — Hearings — Delivery of judgments — Costs — Review — Appeals from appeal tribunal — Employment Appeal Tribunal Rules 1993 (as amended by Employment Appeal Tribunal (Amendment) Rules 2001 and Employment Appeal Tribunal (Amendment) Rules 2004)
Practice Direction (Employment Appeal Tribunal: Procedure) 2004, EAT [2005] ICR 637

Appeals and interlocutory applications — Inspection of register — Documents for use at hearing — Evidence — Case management — Complaints about tribunal hearings — Skeleton arguments — Citation of authorities — Disposal of appeals by consent — Failure to give notice of appearance — Delivery of judgments — Costs — Appeals from appeal tribunal — Employment Appeal Tribunal Rules 1993 (as amended by Employment Appeal Tribunal (Amendment) Rules 2001)
Practice Direction (Employment Appeal Tribunal: Procedure) 2002, EAT [2003] ICR 122

Appellant complaining of bias by employment tribunal — Application for oral examination of tribunal chairman and members — Whether appropriate — Procedure in appeals involving dispute as to bias **Facey v Midas Retail Security Ltd,** EAT [2001] ICR 287

INDUSTRIAL RELATIONS—*continued*

Employment Appeal Tribunal—*continued*

Procedure—continued

Hearing of unfair dismissal complaint — No attendance by applicant employee with solicitors on record — Whether tribunal required to make inquiries — Tribunal dismissing complaint without contacting solicitors — Whether review to be granted — Employment Tribunals (Constitution and Rules of Procedure) Regulations 2001, Sch 1, rr 11(3), 13(5)
Cooke v Glenrose Fish Co, EAT [2004] ICR 1188

Inadequate reasons for employment tribunal decision — Appeal tribunal adjourning appeal and remitting to tribunal for clarification — Whether appropriate — Employment Tribunals Act 1996, s 35(1)(b) **Burns v Royal Mail Group plc (formerly Consignia plc)**, EAT [2004] ICR 1103

Inadequate reasons for employment tribunal decision — Appeal tribunal requesting answers from tribunal chairman — Whether permissible or appropriate procedure — Employment Tribunals Act 1996, s 35(1) — Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004, Sch 1, r 30(3)(b) (as amended by Employment Tribunals (Constitution and Rules of Procedure) (Amendment) Regulations 2004, regs 2(9)(c))
Barke v SEETEC Business Technology Centre Ltd, CA [2005] ICR 1373

Lodging documents with notice of appeal
Practice Statement (Employment Appeal Tribunal: Procedure), EAT [2005] ICR 660

Notice of hearing and originating application sent to respondent's last known place of business — Whether "any other known address or place of business" where respondent having current place of business — Whether valid service — Interpretation Act 1978, s 7 — Employment Tribunals (Constitution and Procedure) Regulations 1993, Sch 1, r 20(3)(c)(i)(ii)
Zietsman (trading as Berkshire Orthodontics) v Stubbington, EAT [2002] ICR 249

Respondent failing to enter appearance to claim — Whether precluded from participating in appeal — Employment Appeal Tribunal Rules 1993, r 18 — Employment Tribunals (Constitution and Rules of Procedure) Regulations 2001, Sch 1, r 3
Atos Origin IT Services UK Ltd v Haddock, EAT [2005] ICR 277

Restricted reporting order — Sex discrimination proceedings against police by transsexual — Lack of anonymity deterrent to pursuit of proceedings by transsexuals — Employment tribunal making restricted reporting order until revoked — Validity — Appeal by police against liability — Jurisdiction of appeal tribunal to make restricted reporting order — Employment Tribunals Act 1996, ss 11, 31 — Employment Tribunals (Constitution and Procedure) Regulations 1993, Sch 1, rr 13(1)(6), 14 — Employment Appeal Tribunal Rules 1993, r 23(3) — Council Directive 76/207/EEC, art 6 **Chief Constable of the West Yorkshire Police v A**, EAT [2001] ICR 128

Time limit

Notice of appeal posted by appellant acting in person well before expiry of time limit not received by appeal tribunal — Whether appropriate to extend time — Employment Appeal Tribunal Rules 1993, r 37(1) **Peters v Sat Katar Co Ltd**, CA [2003] ICR 1574

Employment tribunals

Adjournment of hearing

Applicant seeking adjournment on basis of doctor's advice not to attend — Tribunal doubting genuineness of reason and suspicious of applicant's failure to attend hearing — Adjournment refused and applicant's complaints dismissed — Whether discretion exercised properly
Teinaz v Wandsworth London Borough Council, CA [2002] ICR 1471

Complaint of unfair dismissal — Care worker dismissed for gross misconduct — Secretary of State deciding care worker unsuitable to work with vulnerable adults — Whether unfair dismissal proceedings to be stayed pending worker's appeal to Care Standards Tribunal — Care Standards Act 2000, ss 82, 86 **BUPA Care Homes (CFC Homes) Ltd v Muscolino**, EAT [2006] ICR 1329

Bias

Claimant alleging bias by chairman of tribunal hearing his complaint — Second complaint listed for pre-hearing review by same chairman to consider striking out — Whether claimant's objection to chairman justified — Whether stay of second complaint to be lifted while appeal pending on first complaint **Ansar v Lloyds TSB Bank plc**, EAT [2006] ICR 1565, EAT

INDUSTRIAL RELATIONS—*continued*

Employment tribunals—*continued*

Case management

Chairman ruling amendments raising new claims — Whether "order" — Whether power to reconsider — Different chairman dismissing claims as out of time — Whether power to reconsider previous chairman's decision — Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004 Sch 1, rr 10, 34
Hart v English Heritage (Historic Buildings and Monuments Commission for England), EAT [2006] ICR 655

Claim

Claimant notifying tribunal of withdrawal of discrimination claim — Claimant subsequently seeking to set aside withdrawal — Tribunal refusing respondent's application to dismiss claim — Whether jurisdiction to set aside withdrawal — Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004, Sch 1, r 25
Khan v Heywood & Middleton Primary Care Trust, EAT [2006] ICR 543
CA [2007] ICR 24

Claimant withdrawing part of claim with intention of pursuing it in High Court — Whether abuse of process — Whether part claim to be dismissed on withdrawal — Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004, Sch 1, r 25
Verdin v Harrods Ltd, EAT [2006] ICR 396

Complaint see also ESTOPPEL: **Per rem judicatam:** *Cause of action estoppel*

Claim form failing expressly to state claimant employee of respondent — Clear from form claimant asserting employed by respondent — Whether tribunal right to reject claim — Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004, Sch 1, rr 1(4), 3(2)(a) **Richardson v U Mole Ltd,** EAT [2005] ICR 1664

Claim form giving claimant's solicitor's details but no address for claimant — Whether address "relevant required information" — Whether claim to be rejected — Whether chairman's rejection of claim reviewable on grounds of interests of justice — Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004, Sch 1, rr 1(1)(4), 3(3), 34(3)(e)
Hamling v Coxlease School Ltd, EAT [2007] ICR 108

Complaint alleging unfair dismissal for making protected disclosures — Notice of appearance contending dismissal nothing to do with disclosures — Whether complaint encompassing claim of ordinary unfair dismissal — Employment Rights Act 1996, ss 94, 98
Street v Derbyshire Unemployed Workers' Centre, EAT [2004] ICR 213

Constitution

Lay member unable to complete hearing due to ill-health — Applicant requiring identity of remaining member before consenting to continue — Identity not disclosed — Whether necessary for informed consent — Employment Tribunals Act 1996, s 4(1) (as amended by Employment Rights (Dispute Resolution) Act 1998, s 4) — Employment Tribunals (Constitution and Rules of Procedure) Regulations 2001, reg 9
Rabahallah v British Telecommunications plc, EAT [2005] ICR 440

Constitution of tribunal see EMPLOYMENT: **Grievance procedures:** *Time limit*

Chairman sitting alone to hear breach of contract claim — No exercise of discretion whether to remit to full tribunal — Whether appropriate case for chairman alone — Employment Tribunals Act 1996, ss 3, 4(2)(3)(5) **Morgan v Brith Gof Cyf,** EAT [2001] ICR 978

Claim allocated to chairman sitting alone — No objection from parties — Whether tribunal properly constituted — Employment Tribunals Act 1996, s 4
Gladwell v Secretary of State for Trade and Industry, EAT [2007] ICR 264

Costs see also **Employment Appeal Tribunal:** *Appeal to*

Order awarding successful applicant in person costs for time spent preparing case — Whether jurisdiction to make order **Kingston upon Hull City Council v Dunnachie (No 3),** EAT [2004] ICR 227

Respondent failing to enter response — Tribunal entering default judgment and awarding compensation — Whether power to order respondent to pay costs of remedies hearing — Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004, Sch 1, rr 9, 38(4) **Sutton v The Ranch Ltd,** EAT [2006] ICR 1170

Sex discrimination claimant calling irrelevant evidence and pursuing late allegations — Tribunal finding alleged incidents did not happen or were not discriminatory — Complaint dismissed — Whether appropriate to make award of costs — Employment Tribunals (Constitution and Rules of Procedure) Regulations 2001, Sch 1, r 14(1)
Salinas v Bear Stearns International Holdings Inc, EAT [2005] ICR 1117

INDUSTRIAL RELATIONS—*continued*

Employment tribunals—*continued*

Costs—continued

Unlimited costs order against applicant — Whether applicant's means to be taken into account — Employment Tribunals (Constitution and Procedure) Regulations 1993, Sch 1, r 12(1)(3)(c)
Kovacs v Queen Mary and Westfield College, CA [2002] ICR 919

Decision see also DISCRIMINATION: **Employment:** *Liability of*

Excessive delay between completion of tribunal hearing and decision — Whether decision to be set aside as unsafe — Procedure to avoid excessive delay **Kwamin v Abbey National plc**, EAT [2004] ICR 841

Insufficiency of reasons — Parties to seek clarification from tribunal
Bansi v Alpha Flight Services (Note), EAT [2007] ICR 308

Default judgment

Respondent applying for review — No good explanation provided for failure to enter response in time — Whether conclusive against respondent — Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004, Sch 1, r 33
Pendragon plc (trading as C D Bramall Bradford) v Copus, EAT [2005] ICR 1671

Disclosure

Complaint of race discrimination — Claimant failing security vetting — Respondent refusing to disclose reasons for failure on ground prohibited by law — Tribunal ordering striking out of response unless disclosure provided — Whether appropriate — Proper procedure
Coles v Barracks (Secretary of State for the Home Department intervening), CA [2007] ICR 60

Evidence

Employee secretly recording disciplinary proceedings including deliberations of panel conducted in private — Complaint of unfair dismissal — Whether recordings admissible evidence — Whether any grounds for exclusion — Convention for the Protection of Human Rights and Fundamental Freedoms (1953), art 8
Chairman and Governors of Amwell View School v Dogherty, EAT [2007] ICR 135

Findings of fact see **Employment Appeal Tribunal:** *Procedure*

Grievance procedures

Standard procedure — Claimant presenting questionnaire to employer in relation to equal pay claim — Whether statements on prescribed form constituting statement of grievance — Whether employer required in response form to raise issue of claimant's failure to comply with grievance procedure — Employment Act 2002, s 32(2)(6)(b), Sch 2, para 6 — Employment Act 2002 (Dispute Resolution) Regulations 2004, regs 2(1), 14 **Holc-Gale v Makers UK Ltd**, EAT [2006] ICR 462

Hearing

Member alleged to have consumed alcohol and fallen asleep — Complaint made after tribunal's decision — Whether Employment Appeal Tribunal required to decide if allegations established — Whether hearing unfair **Stansbury v Datapulse plc**, CA [2004] ICR 523

Interlocutory order

Direction for preliminary issue to be determined before complaint heard — Employment tribunal at preliminary hearing ordering issue to be tried at outset of substantive hearing — Whether appropriate **Goldman Sachs Services Ltd v Montali**, EAT [2002] ICR 1251

Jurisdiction

Breach of contract claim against Hong Kong company — Applicant pilot based in Hong Kong under contract governed by Hong Kong law — Whether employment tribunal jurisdiction to stay claim on ground Hong Kong proper forum — Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994, art 3(a) **Dickie v Cathay Pacific Airways Ltd**, EAT [2004] ICR 1733

Claim against Secretary of State on employer's insolvency — Whether tribunal "independent and impartial" — Convention for the Protection of Human Rights and Fundamental Freedoms, art 6(1) **Scanfuture (UK) Ltd v Secretary of State for Trade and Industry Secretary**, EAT [2001] ICR 1096

Employment tribunal accepting jurisdiction to hear race discrimination complaint on preliminary hearing — Employment Appeal Tribunal upholding tribunal's decision and directing complaint to be heard on merits — Complaint heard with two similar complaints between same parties and decision reserved — Court of Appeal decision in unrelated case denying jurisdiction on same issue — Whether tribunal entitled to promulgate decision upholding complaints **Carter v Ahsan**, EAT [2004] ICR 938

INDUSTRIAL RELATIONS—*continued*

Employment tribunals—*continued*

Jurisdiction—continued

Employment tribunal finding as preliminary issue respondent qualifying body for purposes of race discrimination complaint — Employment Appeal Tribunal upholding tribunal's decision and directing complaint to be heard on merits — Complaint heard and decision reserved — Court of Appeal in unrelated case deciding respondent not a qualifying body — Whether tribunal entitled to promulgate decision upholding complaint — Race Relations Act 1976, ss 12(1), 54(1) **Carter v Ahsan,** CA [2005] ICR 1817

Majority decision see EMPLOYMENT: **Unfair dismissal:** *Reasonableness of decision:* Misconduct

Pre-hearing review

Chairman refusing to require deposit from applicant — Application for second review granted — Applicant ordered to pay deposit — Whether jurisdiction to hold second pre-hearing review — Whether appeal from order within time limit — Employment Tribunals (Constitution and Procedure) Regulations 1993, Sch 1, rr 7(1), 16(1) — Employment Appeal Tribunal Rules 1993, r 3(2) **Maurice v Betterware UK Ltd,** EAT [2001] ICR 14

Procedure see also EMPLOYMENT: **Unfair dismissal:** *Constructive dismissal*

Applicant failing to attend hearing following refusal of postponement — Tribunal dismissing complaint — Extent of tribunal's duty to consider merits before exercising discretion to dismiss — Employment Tribunals (Constitution and Procedure) Regulations 1993, Sch 1, rr 9(3), 10 **Roberts v Skelmersdale College,** CA [2003] ICR 1127

Bias — Chairman offering tribunal's preliminary views when hearing to be adjourned after 10 days for final witness — Comments strongly critical of employer — Tribunal upholding employee's complaints after concluding hearing — Employer on appeal alleging apparent bias by tribunal — Appeal tribunal upholding allegation without chairman having opportunity to comment — Whether error of law — Whether expression of tribunal's views creating apparent bias **Southwark London Borough Council v Jiminez,** CA [2003] ICR 1176

Claim struck out following claimant's failure to comply with order to pay deposit within 21 days — Failure due to claimant's error in providing solicitors' address — Whether "administrative error" justifying review — Whether strike-out order reviewable "judgment" — Whether deposit order capable of revocation or variation — Whether power to extend time for payment of deposit after time expired — Employment Tribunals Act 1996, s 35(1) — Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004, Sch 1, rr 10(2)(e)(n), 20(4), 28(1), 34(3)(a) **Sodexho Ltd v Gibbons,** EAT[2005] ICR 1647

Complaint of race discrimination — Complainant's lay representative making unjustified allegation of racial bias in tribunal's refusal of adjournment — Tribunal discharging itself — Whether appropriate — Second tribunal striking out proceedings for being conducted in scandalous manner — Whether order justified — Whether open to appeal tribunal to substitute own strike out order — Employment Tribunals Act 1996, s 35(1) — Employment Tribunals (Constitution and Procedure) Regulations 1993, Sch 1, r 13(2)(e) **Bennett v Southwark London Borough Council,** CA [2002] ICR 881

Respondent failing to comply with direction for simultaneous exchange of witness statements — Tribunal striking out notice of appearance — Whether appropriate — Employment Tribunals (Constitution and Rules of Procedure) Regulations 2001, reg 10 **Weir Valves & Controls (UK) Ltd v Armitage,** EAT [2004] ICR 371

Reasons for decision

Request for extended reasons more than 21 days after summary reasons sent by post — Party stating summary reasons not received — Whether out of time — Whether extension of time to be granted — Interpretation Act 1978, s 7 — Employment Tribunals (Constitution and Procedure) Regulations 1993, Sch 1, rr 10(4), 15 **Scotford v SmithKline Beecham,** EAT [2002] ICR 264

Reference to Court of Justice

Tribunal referring question at pre-hearing review — Whether discretion properly exercised — Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004, Sch 1, r 58 **Attridge Law v Coleman,** EAT [2007] ICR 654

Response

Claim not received by respondent — Chairman ordering claim to be re-sent — Response presented more than 28 days from sending of original claim but within 28 days of receipt of re-served claim — Whether response in time — Whether power to re-serve claim — Appropriate procedure — Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004, Sch 1, rr 4, 8, 34 **Bone v Fabcon Projects Ltd,** EAT [2006] ICR 1421

INDUSTRIAL RELATIONS—*continued*

Employment tribunals—*continued*

Response—continued

No response presented — Default judgment on liability entered — Respondent attending remedies hearing — Chairman refusing to review default judgment — Whether refusal to accept late response — Whether power to review — Whether respondent to be barred from participating in remedies hearing — Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004, Sch 1, rr 4, 9, 33, 34 **D & H Travel Ltd v Foster,** EAT [2006] ICR 1537

Response presented out of time — Respondent debarred from taking part in proceedings — Judgment and compensation award against respondent — Respondent's request for reasons refused — Whether entitled to reasons — Whether appropriate for appeal tribunal to request reasons — Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004, Sch 1, rr 9, 30(3)(b) **NSM Music Ltd v Leefe,** EAT [2006] ICR 450

Response rejected by tribunal staff as not being in correct form — Whether rejection reviewable — Whether appealable — Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004, Sch 1, rr 6(1), 34(1)(a) **Butlins Skyline Ltd v Beynon (Note),** EAT [2007] ICR 121

Tribunal refusing to accept late response — Whether power to review — Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004, Sch 1, rr 4, 6, 34 **Moroak (trading as Blake Envelopes) v Cromie,** EAT [2005] ICR 1226

Restricted reporting order

Sex discrimination proceedings by transsexual — Whether case "appearing to involve" allegations of sexual offence or sexual misconduct — Whether jurisdiction to make order where case not involving such allegations but applicant deterred from proceeding by lack of anonymity — Employment Tribunals Act 1996, ss 11(6), 30(3) — Employment Tribunals (Constitution and Rules of Procedure) Regulations 2001, Sch 1, rr 15(6), 16(1) — Council Directive 76/207/EEC, art 6 **X v Comr of Police of the Metropolis,** EAT [2003] ICR 1031

Review of decision

Application for review based on evidence not adduced at hearing — Tribunal refusing review and referring to authorities not drawn to parties' attention — Whether refusal unfair — Employment Tribunals (Constitution and Rules of Procedure) Regulations 2001, Sch 1, r 13(1)(e) **Stanley Cole (Wainfleet) Ltd v Sheridan,** EAT [2003] ICR 297
CA [2003] ICR 1449

Chairman refusing applications to add new complaint and join new respondent — Whether "orders" — Whether power to review — Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004, Sch 1, rr 10(1)(2), 28(1)(b), 34(1) **Onwuka v Spherion Technology UK Ltd,** EAT [2005] ICR 567

No appearance by respondent employers — Tribunal upholding applicant's unfair dismissal complaint and ordering reinstatement — Whether appropriate — Employers granted review on interests of justice ground — Tribunal of its own motion revoking review decision for want of jurisdiction and confirming original decision — Whether appropriate — Employment Tribunals (Constitution and Rules of Procedure) Regulations 2001, Sch 1, rr 3(3), 13(1) **Southwark London Borough Council v Bartholomew,** EAT [2004] ICR 358

Order striking out complaint for non-compliance with interlocutory order — Application for review — Factors to be considered — CPR r 3.9 — Employment Tribunals (Constitution and Rules of Procedure) Regulations 2001, Sch 1, r 13 **Maresca v Motor Insurance Repair Research Centre,** EAT [2005] ICR 197

Revocation of order see EMPLOYMENT: **Unfair dismissal:** *Compensation:* Reinstatement order

Striking out proceedings see also *Procedure*

Claim of unfair dismissal by reason of protected disclosures — Conflict of fact as to reason for dismissal — Tribunal finding claim bound to fail and striking out claim — Whether apparent bias by tribunal — Whether striking-out order appropriate — Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004, Sch 1, rr 18, 20 **Ezsias v North Glamorgan NHS Trust,** CA [2007] ICR 1126

Complaint having no reasonable prospect of success — Whether general power to strike out — Employment Tribunals (Constitution and Procedure) Regulations 1993, Sch 1, rr 7(4), 9(1), 13(1)(2) **Care First Partnership Ltd v Roffey,** CA [2001] ICR 87

INDUSTRIAL RELATIONS—*continued*

Employment tribunals—*continued*

Striking out proceedings—continued

Complaint of racial discrimination — Tribunal rejecting named comparators and finding no prima facie case in absence of comparators — Whether tribunal required to construct hypothetical comparator — Complaint struck out as having no chance of success — Whether "scandalous, frivolous or vexatious" — Whether right to strike out claim — Race Relations Act 1976, s 3(4) — Employment Tribunals (Constitution and Procedure) Regulations 1993, Sch 1, r 13(2)
Balamoody v United Kingdom Central Council for Nursing, Midwifery and Health Visiting, CA [2002] ICR 646

Trade union activities

Action short of dismissal

Promotion offered to trade union official on full-time release without commensurate salary increase until in new post — Whether decision not to pay new salary with immediate effect "action" to deter participation in union activities — Male official upgraded 8 years earlier paid at higher rate while on release — Whether showing discrimination on ground of sex — Sex Discrimination Act 1975, s 1(1) — Trade Union and Labour Relations (Consolidation) Act 1992, s 146(1) **Southwark London Borough Council v Whillier,** EAT [2001] ICR 142
CA [2001] ICR 1016

INJUNCTION

Contract of employment *see* EMPLOYMENT: **Contract of employment:** *Frustration*

Jurisdiction to grant

Restraint of foreign proceedings

Proceedings brought in European Convention contracting state — Action commenced in another state with aim of frustrating existing proceedings — Whether court of first state competent to grant injunction against commencement or continuation of proceedings in second state — Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1968 (as amended), art 28 **Turner v Grovit (Case C-159/02),** ECJ [2005] ICR 23

Proceedings brought in Spain against plaintiff in English proceedings — Spanish proceedings having sole purpose of harassing plaintiff — Whether abuse of process of English court — Whether jurisdiction to grant injunction restraining pursuit of Spanish proceedings — Whether injunction inconsistent with Brussels Convention — Civil Jurisdiction and Judgments Act 1982, s 2(1), Sch 2, art 3(1) **Turner v Grovit,** HL(E) [2002] ICR 94

INSOLVENCY

Administration order

Discharge

Administrators adopting employees' contracts — PAYE and national insurance contributions deducted from employees' salaries — Administrators failing to account to revenue for deductions — Whether liabilities enjoying special priority on termination of administration — Insolvency Act 1986, s 19(5)(6) (as amended by Insolvency Act 1994, s 1)
In re FLJ Realisations Ltd, CA [2001] ICR 424

JUDICIAL PRECEDENT

Court of Session decision *see* EMPLOYMENT: **Working time provisions:** *Paid annual leave*

JUDICIAL REVIEW

Police

Secondment

Applicant's secondment to national crime squad summarily terminated — No reason given other than lack of confidence in management performance — No private law remedy available — Whether decision amenable to judicial review
R (Tucker) v Director General of the National Crime Squad, CA [2003] ICR 599

LICENSING

Private security industry

Door supervisors

Licensing regime automatically barring certain former offenders from obtaining licences — Whether rule ultra vires — Whether unlawfully fettering licensing authority's discretion — Whether interference with right to enjoyment of possessions — Human Rights Act 1998, Sch 1, Pt II, art 1 — Private Security Industry Act 2001, s 7
R (Nicholds) v Security Industry Authority, Kenneth Parker QC [2007] ICR 1076

LIMITATION OF ACTION

Personal injuries

Date of knowledge of victim

Employee injured at work — Employee initially unaware of identity of true employer — Whether primary limitation period not commencing till true identity known — Limitation Act 1980, ss 11(4), 14(1) **Cressey v E Timm & Son Ltd (Practice Note)**, CA [2006] ICR 282

Time limit, power to override

Employee suffering vibratory white finger — Condition gradual in onset and progression — Claim one of many against employers — Whether discretion to disapply three-year limitation period to be exercised — Limitation Act 1980, ss 11, 33 **Allen v British Rail Engineering Ltd**, CA [2001] ICR 942

MEDICAL PRACTITIONER

Discipline

"Serious professional misconduct"

Whether confined to matters of clinical practice — Whether including conduct as expert witness in criminal proceedings — Whether appeal from disciplinary panel by way of review or rehearing — Medical Act 1983, s 40 — CPR r 52.11, PD 52, para 22.3 **Meadow v General Medical Council**, CA [2007] ICR 701

Fitness to Practise Panel

Appeal

Doctors appealing against suspension and erasure from register imposed by panel — Extent of court's jurisdiction to vary penalty imposed by panel — Medical Act 1983, ss 36(1) (as amended by Medical Act 1983 (Amendment) Order 2000, art 5), 40(7) (as substituted by Medical Act 1983 (Amendment) Order 2002, art 13) **Raschid v General Medical Council**, CA [2007] ICR 811

Procedure

Hearing to assess practitioner's fitness to practise — Panel retiring with medical assessors — Assessors rehearsing to parties advice given to panel in camera — Practitioner complaining assessors exceeding function — Panel refusing to recuse itself and announcing decision without hearing parties' submissions on substance of assessors' advice — Whether hearing fair — General Medical Council Health Committee (Procedure) Rules 1987, Sch 2, para 5 **Watson v General Medical Council**, Stanley Burnton J [2006] ICR 113

Performers list

Suspension

Medical practitioner suspended from list pending investigation — Suspension imposed in breach of procedure — Primary care trust annulling suspension and imposing new suspension — Whether six-month limit on interim suspension running from initial decision to suspend — Whether suspension lawful — Whether right to practise "possession" — Whether breach of practitioner's rights to fair hearing and peaceful enjoyment of possessions — National Health Service (Performers Lists) Regulations 2004, reg 13 — Convention for the Protection of Human Rights and Fundamental Freedoms (1953), art 6, First Protocol, art 1 **R (Malik) v Waltham Forest Primary Care Trust**, Collins J [2006] ICR 1111

Professional Conduct Committee

Procedure

Committee's findings of fact — Whether reasons for findings to be given — Sanction for finding of serious professional misconduct — Weight to be given to mitigating factors **Gupta v General Medical Council**, PC [2002] ICR 785

NATURAL JUSTICE

Bias

Apparent bias

Judge applying for job at consultancy providing expert evidence in case in which judge sitting — Judge withdrawing application — Whether appearance of bias — Appropriate test **In re Medicaments and Related Classes of Goods (No 2)**, CA [2001] ICR 564

NEGLIGENCE

Causation

Asbestos exposure

Claimants developing mesothelioma after exposure to asbestos dust in more than one employment — Inhalation of single or many asbestos fibres equally probable trigger of disease — Claimants unable to establish which employment causing mesothelioma — Whether any employer liable **Fairchild v Glenhaven Funeral Services Ltd**, HL(E) [2002] ICR 798

NEGLIGENCE—*continued*

Causation—*continued*

Asbestos exposure—continued

Claimants developing mesothelioma after exposure to asbestos in more than one employment — Mesothelioma triggered by single inhalation of asbestos dust — Claimants unable to establish which employment causing mesothelioma — Whether any employer liable — Whether claimant suffering other asbestos-related damage entitled to provisional damages for risk of developing mesothelioma — County Courts Act 1984, s 51(1) — CPR r 41.2(2)
Fairchild v Glenhaven Funeral Services Ltd, CA [2002] ICR 412

Employee developing mesothelioma after exposure to asbestos dust in more than one employment and period of self-employment — Claimant unable to establish which period of exposure causing mesothelioma — Whether employers jointly and severally liable for exposure to asbestos or merely severally liable for risk of causing disease **Barker v Corus UK Ltd,** HL(E) [2006] ICR 809

Suicide

Employee suffering serious injury at work — Employer admitting negligence and/or breach of statutory duty — Employee suffering post-traumatic stress disorder leading to severe depression and eventual suicide — Whether employer liable for suicide — Whether relevant that suicide not reasonably foreseeable — Fatal Accidents Act 1976, s 1
Corr v IBC Vehicles Ltd, CA [2006] ICR 1138

Vibratory white finger

Claimant's condition gradually advancing for some years before defendants should have been aware of risk — Defendants' tortious conduct materially contributing to claimant's disability — Whether defendants liable only for excess damage attributable to their negligence — Apportionment of liability **Allen v British Rail Engineering Ltd,** CA [2001] ICR 942

Contributory negligence *see* HEALTH AND SAFETY: **Employer's liability:** *Workplace obstruction*

Damage

Asbestos exposure

Claimants diagnosed with pleural plaques indicating exposure to asbestos — Whether aggregate of presence of pleural plaques, risk of plaques developing into serious illness and resulting anxiety giving rise to claim against employer — Whether employer liable for psychiatric injury caused by fear of contracting asbestos-related disease — Assessment of damages for such claims **Rothwell v Chemical & Insulating Co Ltd,** CA [2006] ICR 1458

Claimants diagnosed with pleural plaques indicating exposure to asbestos — Whether aggregate of presence of plaques, risk of developing serious illness and resulting anxiety giving rise to claim against employer — Whether employer liable for psychiatric injury caused by fear of contracting asbestos-related disease **Rothwell v Chemical & Insulating Co Ltd,** HL(E) [2007] ICR 1745

Duty of care to whom?

Dock worker

Dock workers allocated to employers by labour board under statutory scheme — Board's functions including provision for dockers' welfare — Claimants contracting asbestos related illness from unloading shipments of asbestos — Whether board owing duty of care to claimants to protect against risk from asbestos — Dock Workers (Regulation of Employment) Order 1947, Sch, cl 3(1)(g) **Rice v Secretary of State for Trade and Industry,** CA [2007] ICR 1469

Employee see also TORT: **Cause of action:** *Harassment*

Employee contracting asthma at work — Employers aware of risk to employee's health — Whether in breach of duty in allowing employee to continue in job
Coxall v Goodyear Great Britain Ltd, CA [2003] ICR 152

Employee suffering psychiatric injury caused by work-related stress — Employers failing to deal with employee's complaints of overwork and conflicting pressures — Employee not availing herself of employers' counselling service — Whether employers in breach of duty of care
Daw v Intel Corpn Ltd, CA [2007] ICR 1318

Employee suffering psychiatric injury caused by work-related stress — Whether employer in breach of duty **Barber v Somerset County Council,** HL(E) [2004] ICR 457

Employees suffering psychiatric injury caused by work-related stress — Whether employers under duty of care — Whether employers in breach of duty — Appropriate test and approach
Hatton v Sutherland, CA [2002] ICR 613

NEGLIGENCE—*continued*

Duty of care to whom?—*continued*

Employee—continued

Employees suffering psychiatric injury caused by work-related stress — Whether reasonably foreseeable — Employee suffering psychiatric injury caused by specific trauma at work — No prior indication of stress — Employer aware of general risk to employees of injury from specific trauma — Whether injury to particular employee foreseeable — Employee's pre-existing vulnerable mental state possibly affecting future earning ability — Whether damages for loss of earnings to be reduced
Hartman v South Essex Mental Health and Community Care NHS Trust, CA [2005] ICR 782

Employer trustee and administrator of company pension scheme — Employee re-employed by company but not rejoining scheme — Subsequent resignation due to ill-health — Employee dying before start date of deferred pension — Estate entitled only to return of contributions rather than annuity for dependants had employee rejoined scheme — Whether employer under duty of care to advise employee **Outram v Academy Plastics Ltd,** CA [2001] ICR 367

Stress-related illness caused by work overload — Employee informing employer of fears for future health but not of present illness — Whether employer's delay in introducing safer working procedure causative of injury — Whether risk foreseeable
Pratley v Surrey County Council, CA [2004] ICR 159

Independent contractor

Subcontractor's employee fatally injured at work — Widow awarded damages against subcontractor — Subcontractor claiming contribution from main contractor and principal — Whether main contractor and/or principal owing duty of care to subcontractor's employee — Whether breach of duty **Gray v Fire Alarm Fabrication Services Ltd,** CA [2007] ICR 247

Police officer

Police officer transferring from defendant's force to another force — Executive officer with defendant's force handling transfer and reassuring officer as to continuing entitlement to benefit — Whether duty of care owed to officer — Loss of benefit resulting from failure to give correct advice — Whether defendant liable for loss
Lennon v Comr of Police of the Metropolis, CA [2004] ICR 1114

Foreseeability of injury

Nervous shock

Employee's fall in workplace causing physical injury — Anger at occurrence of accident given previous warning to employer exacerbating pre-existing skin condition leading to depressive illness — Whether employer liable for depressive illness in addition to physical injury
Simmons v British Steel plc, HL(Sc) [2004] ICR 585

Safe system of work

Ambulance crew

Ambulance technician injured carrying patient downstairs — Balance between public duty and reasonable care to avoid to risk to crew — Whether employer negligent
King v Sussex Ambulance Service NHS Trust, CA [2002] ICR 1413

Asbestos

Marine engineers working in ships' engine rooms in 1950s — Danger from asbestos when disturbed — Liability of employer **Jeromson v Shell Tankers (UK) Ltd,** CA [2001] ICR 1223

Building site

Painter employed by subcontractor using tower scaffold provided by main contractor — No instruction given as to erection and use — Tower toppling over — Whether main contractor owing duty of care to injured painter **Makepiece v Evans Bros (Reading),** CA [2001] ICR 241

Noise

Excessive noise in train locomotive cab — Known risk of noise affecting employees' hearing — Employer knowingly considering precautions impracticable — Judge finding causation established but rejecting claim — Whether employer negligent — Whether breach of statutory duty — Noise at Work Regulations 1989, regs 8(1), 11 **Harris v BRB (Residuary) Ltd,** CA [2005] ICR 1680

Underprovision

Valuation showing significant shortfall — Employers unable to meet statutory debt owed for shortfall — Whether permissible for trustee to compromise debt — Trustee Act 1925, s 15 — Pensions Act 1995, ss 60, 75
Bradstock Group Pension Scheme Trustees Ltd v Bradstock Group plc, Charles Aldous QC [2002] ICR 1427

NEGLIGENCE—*continued*

Safe system of work—*continued*

Vibration white finger

Employees operating vibratory tools in woodworking factory developing vibration-induced white finger — Whether employer under duty to assess vibration levels and monitor employees for symptoms — Employees' exposure not exceeding recommended maxima — Whether employer liable **Doherty v Rugby Joinery (UK) Ltd,** CA [2004] ICR 1272

OCCUPIERS' LIABILITY

Independent contractor

Contractor carrying out work on occupier's premises

Contractor's employee contracting mesothelioma from asbestos dust generated by activities of contractors' employees — Whether occupier under duty of care to contractor's employees — Occupiers' Liability Act 1957, s 2 **Fairchild v Glenhaven Funeral Services Ltd,** CA [2002] ICR 412

Visitor

Building works

Householder excavating deep pit over which to build garage — Whether higher standard of care required than of ordinary occupier undertaking minor works — Driver delivering concrete blocks falling into unguarded pit — Whether "person at work" for purposes of regulations relating to construction work — Claim against householder and employer — Whether order for householder to pay employer's costs appropriate where householder unsuccessful in blaming employer — Occupiers' Liability Act 1957, s 2(2) — Construction (Health, Safety and Welfare) Regulations 1996, reg 3(1) **Moon v Garrett,** CA [2007] ICR 95

PATENT

Entitlement

Employer and employee

Employee inventing method of trading financial instruments on electronic exchanges — Whether invention made "in the course of the normal duties" of employee — Whether invention "might reasonably be expected to result" from carrying out of his duties — Whether qualities of employee relevant to issue of reasonable expectation — Whether invention owned by employer — Patents Act 1977, s 39(1)(a) **LIFFE Administration and Management v Pinkava,** CA [2007] ICR 1489

POLICE

Disciplinary procedure *see* TRIBUNAL: **Police disciplinary board**

Hearing before chief constable

Police officer complaining of sex discrimination to employment tribunal — Chief constable respondent to complaint — Disciplinary proceedings brought against officer — Chief constable refusing to remit disciplinary proceedings for hearing by another chief constable — Whether decision to be quashed — Police (Discipline) Regulations 1985, regs 13(1), 14
R (Bennion) v Chief Constable of the Merseyside Police, CA [2002] ICR 136

Suspension

Assistant chief constable suspended pending disciplinary proceedings — Whether subject to disciplinary proceedings after expiry of fixed term of appointment — Police Regulations 1995, reg 16(1) **Surrey Police Authority v Beckett,** CA [2002] ICR 257

Pension

Deferred pension

Former policeman seeking early payment on ground permanently disabled — Question of permanence of disablement referred to medical practitioner — Medical practitioner certifying disablement permanent "subject to conditions" — Whether inappropriate — Police Pensions Regulations 1987, regs B5(4)(a), H1(2)(a)(b) **R (Sussex Police Authority) v Beck (Note),** Keith J [2006] ICR 570

Policeman's injury award

Medical practitioner issuing certificate determining degree of police officer's disablement — Appeal to medical referee — Whether medical referee to determine degree of disablement as at date of original certificate — Police Pensions Regulations 1987, regs H1, H2
R (McGinley) v Schilling, CA [2005] ICR 1282

Officer retiring as result of stress caused by internal disciplinary investigation — Whether injury received "in the execution of duty" — Police Pensions Regulations 1987, regs A11, B4
R (Stunt) v Mallett, CA [2001] ICR 989

PRACTICE
Appeal
Permission to appeal
Application to set aside permission to appeal — Appeal bound to fail on existing authority — Whether appropriate to set aside permission — CPR r 52.9(1)(b)
Beedell v West Ferry Printers Ltd, CA [2001] ICR 962

Discovery
Third party
Proceedings against employer for personal injuries — Claimant employee ordered to supply authority for defendants to obtain general practitioner and hospital records — Whether order valid — Whether proper exercise of court's discretion — CPR rr 31.6, 31.12
Bennett v Compass Group UK and Ireland Ltd, CA [2002] ICR 1177

RESTRAINT OF TRADE
Employment
Financial services
Covenant restraining employees from providing advice to any client of "the company" — Employer company providing services to clients only through subsidiaries — Whether "the company" including subsidiaries — Whether restrictions more than reasonably necessary for protection of employer — Whether enforceable — Whether unreasonable restrictions severable **Beckett Investment Management Group Ltd v Hall,** CA [2007] ICR 1539

Managing director
Employer specialising in social housing market insurance — Covenant prohibiting managing director from competing with employer's business for 12 months after termination of employment — Whether managing director exposed to confidential information entitled to protection — Whether covenant reasonable **Thomas v Farr plc,** CA [2007] ICR 932

Solicitor
Covenants prohibiting for one year after termination of employment practice as solicitor within six miles and acting for employer's clients — Whether enforceable **Allan Janes LLP v Johal,**
Bernard Livesey QC [2006] ICR 742

RESTRICTIVE PRACTICES
Practice
Concurrent proceedings
Claimant making complaint to Director General of Fair Trading and initiating High Court proceedings based on same facts — Director General refusing to investigate — Whether court proceedings to be stayed before discovery pending appeal to Competition Commission Appeal Tribunal **Synstar Computer Services (UK) Ltd v ICL (Sorbus) Ltd,**
Lightman J [2002] ICR 112

Restriction
Variation of court's decision
Declarations exempting goods for purposes of resale price maintenance — Application for leave to discharge exemption order — Whether prima facie evidence of material change in circumstances — Resale Prices Act 1976, ss 14, 17
In re Medicaments and Realated Classes of Goods (No 3), RPCt [2001] ICR 306

REVENUE
Income tax
Earnings from work done abroad
Relief in respect of emoluments from periods of employment as seafarer — Taxpayers working on mobile offshore oil drilling rigs — Rigs moved under tow by tugs — Whether rig "ship" — Whether commissioners' conclusion open to review on appeal — Income and Corporation Taxes Act 1988, s 193(1), Sch 12, para 3(2A) (as inserted by Finance Act 1988, s 67)
Clark v Perks (No 2), CA [2002] ICR 302

Settlement
Spouses acquiring company to provide husband's personal services to clients — Each purchasing one share — Wife undertaking administration — Modest salaries paid by company — Whether "settlement" — Whether wife's dividend payments to be treated as income of husband as settlor — Whether wife's share outright gift — Income and Corporation Taxes Act 1988, ss 660A(1)(6), 660G(1)(2) (as inserted by Finance Act 1995, s 74, Sch 17, Pt I)
Jones v Garnett, CA [2006] ICR 690
HL(E) [2007] ICR 1259

Tax avoidance
Personal service companies
Services of software engineer provided to client through intermediary company — Whether engineer to be regarded as employed by client — Social Security Contributions (Intermediaries) Regulations 2000, reg 6(1) **Synaptek Ltd v Young,** Hart J [2003] ICR 1149

REVENUE—*continued*

Value added tax

Deductibility of input tax

Exclusion of credit for input tax on cars — Company purchasing car for director's business use — Director's contract of employment prohibiting private use — Car kept in office car park adjacent to director's home — Whether intended to be made available for private use — Value Added Tax (Input Tax) Order 1992, art 7(2G) (as inserted by Value Added Tax (Input Tax) (Amendment) (No 3) Order 1995, art 6) **Customs and Excise Comrs v Elm Milk Ltd,** CA [2006] ICR 880

SOCIAL SECURITY

Appeal to social security appeal tribunal

Jurisdiction

Appeal from adjudication officer's decision withdrawn by appellant — Whether jurisdiction to hear withdrawn appeal — Whether lack of jurisdiction capable of waiver — Social Security (Adjudication) Regulations 1995, reg 6(2)
Rydqvist v Secretary of State for Work and Pensions, CA [2002] ICR 1383

Incapacity benefit

Validity of regulation

Statutory procedure requiring reference of proposals to advisory committee unless committee agreeing otherwise — Committee's agreement to forego reference based on misrepresentation by Secretary of State's officials — Whether regulation made by Secretary of State thereafter invalid — Social Security Administration Act 1992, ss 170(4), 172(1), 173(1)(b) — Social Security (Incapacity for Work) (General) Regulations 1995, reg 27 (as amended by Social Security (Incapacity for Work and Miscellaneous Amendments) Regulations 1996, reg 2(9))
Howker v Secretary of State for Work and Pensions, CA [2003] ICR 405

Income support

Entitlement

Claimant with "recognisable cycle of work" of one school year employed only during school terms — Claims for income support and job seeker's allowance during holidays — Whether claimant "in remunerative work" during unpaid holidays — Whether holiday periods to be disregarded in calculating average weekly hours of work — Income Support (General) Regulations 1987, reg 5(2)(b)(i)(3B) (as inserted by Income-related Benefit Schemes (Miscellaneous Amendments) Regulations 1995, reg 19(b)) — Jobseeker's Allowance Regulations 1996, reg 51(2) **Banks v Chief Adjudication Officer,** HL(E) [2001] ICR 877

Industrial injuries benefit

Prescribed diseases

Carpal tunnel syndrome caused by use of hand-held tools resting on vibrating sewing machine — Whether "hand-held vibrating tools" — Social Security (Industrial Injuries) (Prescribed Diseases) Regulations 1985, reg 2(a), Sch 1, para A12 (as amended by Social Security (Industrial Injuries) (Prescribed Diseases) Amendment Regulations 1993))
Janicki v Secretary of State for Social Security, CA [2001] ICR 1220

Jobseeker's allowance

Entitlement

Full-time student on leave of absence while pregnant refused allowance — Whether direct sex discrimination — Whether statutory provisions contrary to principle of equal treatment — Jobseeker's Allowance Regulations 1996 regs 1(3), 15 — Council Directive 79/7/EEC, art 4
Walter v Secretary of State for Social Security, CA [2002] ICR 540

TORT

Cause of action

Harassment see also VICARIOUS LIABILITY: **Employment:** *Harassment*

Employee complaining of aggressive and abusive conduct by fellow employee — Whether single incident involving complainant sufficient — Employee suffering from depressive disorder and unable to work — Whether foreseeable — Whether employer liable in negligence — Protection from Harassment Act 1997, ss 1, 7 **Banks v Ablex Ltd,** CA [2005] ICR 819

TRADE DISPUTE

Act in furtherance of

Ballot

Union failing to send ballot papers to two members entitled to vote — Ballot resulting in 26 to nil in favour of industrial action — Whether action having support of ballot — Action consisting of teachers' refusal to accept direction to teach disruptive pupil — Whether "trade dispute" — Trade Union and Labour Relations (Consolidation) Act 1992, ss 227(1), 230(2), 232A, 232B (as inserted by Employment Relations Act 1999, Sch 3, paras 8, 9), 244(1)
P (A Minor) v National Association of School Masters/Union of Women Teachers,
CA [2001] ICR 1241
HL(E) [2003] ICR 386

TRADE DISPUTE—*continued*

Act in furtherance of—*continued*

Procuring breach of contract

Council employees working in assessment and advice unit — Proposal to contract out unit's services to private company — Union balloting members "to persuade council to retain [employees] within its employment" — Whether trade dispute — Union's notice enabling employer to identify 45 employees involved — Whether notice satisfying requirement as to category of employee — Trade Union and Labour Relations (Consolidation) Act 1992, ss 219(1), 226A(2)(c)(3A) (as inserted by Trade Union and Employment Rights Act 1993, s 18(2) and amended by Employment Relations Act 1999, Sch 3, para 3), 244(1)
Westminster County Council v UNISON, CA [2001] ICR 1046

Union giving notice to employer prior to ballot and industrial action — Notice describing affected employees as being "employed in all categories at all workplaces" — Employer no means of identifying union members — Whether notices valid — Trade Union and Labour Relations (Consolidation) Act 1992, ss 226A(2)(3A), 234A(3)(5A) (as inserted by Trade Union Reform and Employment Rights Act 1993, ss 18(2), 21 and amended by Employment Relations Act 1999, Sch 3, paras 3, 11)
London Underground Ltd v National Union of Rail, Maritime & Transport Workers, CA [2001] ICR 647

TRADE UNION

Membership

Disciplinary action

Union's letter before action seeking undertakings from member not to infringe union's trade mark and to pay legal costs — Whether letter "determination" to discipline member — Trade Union and Labour Relations (Consolidation) Act 1992, ss 64(1)(2), 65(1)(2)
Beaumont v Amicus, EAT [2007] ICR 341

Recognition

Reference to central arbitration committee

Ballot conducted by qualified independent person — Result notified to committee — Union complaining some employees not receiving ballot papers — Whether committee having jurisdiction to order re-run of ballot — Trade Union and Labour Relations (Consolidation) Act 1992, Sch A1, para 29 (as inserted by Employment Relations Act 1999, s 1(3), Sch 1)
R (Ultraframe (UK) Ltd) v Central Arbitration Committee, CA [2005] ICR 1194

Employer entering into voluntary recognition agreement with union having one relevant member — Union with majority of employees applying to committee for recognition — Whether valid recognition agreement "already in force" precluding application — Trade Union and Labour Relations (Consolidation) Act 1992, Sch A1, para 35 (as inserted by Employment Relations Act 1999, s 1(2), Sch 1) — Convention for the Protection of Human Rights and Fundamental Freedoms (1953), art 11 **R (National Union of Journalists) v Central Arbitration Committee,**
Hodge J [2005] ICR 493
CA [2006] ICR 1

Employer rejecting union's request for recognition — Union referring issue of appropriate bargaining unit to committee — Employer proposing different bargaining unit — Committee concluding unit proposed by union appropriate — Whether conclusive or committee required to choose between proposed units — Trade Union and Labour Relations (Consolidation) Act 1992, Sch A1, paras 11, 19 (as inserted by Employment Relations Act 1999, s 1(3))
R (Kwik-Fit (GB) Ltd) v Central Arbitration Committee, CA [2002] ICR 1212

Union seeking compulsory recognition by employer in respect of cameramen and women engaged from time to time on freelance contracts — Whether group of "workers" — Trade Union and Labour Relations (Consolidation) Act 1992, s 296(1)(b), Sch A1, para 1 (as inserted by Employment Relations Act 1999, s 1(3), Sch 1)
R (British Broadcasting Corpn) v Central Arbitration Committee, Moses J [2003] ICR 1542

Shop stewards

Authority of

Shop steward of closed shop negotiating variation of employment contract — Signed agreement returned to employers 2 months later — Employee subsequently claiming workforce not consulted — Whether shop steward having authority to bind employees to their detriment
Harris v Richard Lawson Autologistics Ltd, CA [2002] ICR 765

TRIBUNAL

Bias

Disability appeal tribunal

Medical member also undertaking work as examining medical practitioner — Whether likelihood of bias in favour of views of other examining medical practitioners
Gillies v Secretary of State for Work and Pensions, HL(Sc) [2006] ICR 267

TRIBUNAL—*continued*

Police disciplinary board

Immunity from suit

Civilian employee alleging sexual assault by police inspector — Disciplinary board appointed — Complaint by employee of sex discrimination by board in conduct of proceedings — Whether board's proceedings immune — Whether employment tribunal jurisdiction to hear complaint — Police (Discipline) Regulations 1985, regs 18, 23, 24 — European Convention for the Protection of Human Rights and Fundamental Freedoms, arts 6, 8
Heath v Comr of Police of the Metropolis, CA [2005] ICR 329

Police constable dismissed by board — Complaint of unfair dismissal on ground of protected disclosure — Whether board's decision immune from suit — Employment Rights Act 1996, s 43KA (as inserted by Police Reform Act 2002, s 37(1)) **Lake v British Transport Police,** EAT [2007] ICR 47

Police constable dismissed following direction of board — Complaint of unfair dismissal on ground of protected disclosure — Whether proceedings before board and board's decision immune from suit — Whether employment tribunal precluded from considering claim
Lake v British Transport Police, CA [2007] ICR 1293

TRUSTS

Pension scheme

Maladministration

Council making long service award enhancing employee's pension — Whether lawful — Council subsequently refusing to pay enhanced element of pension following advice award unlawful — Whether maladministration **Barking and Dagenham London Borough Council v Watts,** Jacob J [2003] ICR 1059

Trust deed and scheme rules providing for reduced pension if taken before normal retirement date — Employer's letter inviting employee to join scheme stating early retirement possible without reduction if 20 years' pensionable service completed — Scheme's explanatory booklet confirming statement but stating early retirement subject to employer's consent and containing notice that trust deed and rules to prevail — Whether employer and trustees estopped from denying employee's entitlement to early retirement on unreduced pension
Steria Ltd v Hutchison, CA [2007] ICR 445

Pensions Ombudsman

Costs of appeal — Trustee and insurer of scheme both appealing against decision of ombudsman — Trustee and insurer separately represented — Ombudsman appearing by counsel at hearing of appeal to defend determination — Appeal allowed — Extent of ombudsman's liability in costs — Whether parties separately appearing in same interest both entitled to costs — Whether trustee or insurer to be awarded costs
Moore's (Wallisdown) Ltd v Pensions Ombudsman, Ferris J [2002] ICR 773

Insurance company making payments to trustees of pension scheme against company for partial surrender of policy forming part of scheme assets — Complaint of maladministration against company — Whether company "concerned with the . . . administration of . . . the scheme" — Whether jurisdiction to entertain complaint — Pension Schemes Act 1993, s 146(4)(b) (as substituted by Pensions Act 1995, s 157) — Personal and Occupational Pension Schemes (Pensions Ombudsman) Regulations 1996, regs 1(2), 2(1)
R (Britannic Asset Management Ltd) v Pensions Ombudsman, CA [2003] ICR 99

Short service benefit

Trustee calculating benefit on basis scheme members having uniform retirement age — Actuarial reduction applied to benefit of members with contractual retirement age below uniform age — Whether practice lawful — Pension Schemes Act 1993, ss 71(1)(2)(3), 72(1), 74(1), 180
Universities Superannuation Scheme Ltd v Simpson, Lloyd J [2004] ICR 1426

Surplus fund

Occupational pension scheme providing for regular actuarial valuations — Scheme requiring employer to make arrangements to deal with actuarial surplus — Employer using part of surplus to offset existing accrued liabilities to make contributions — Whether permissible — Pensions Act 1995, s 37(1)(2) **National Grid Co plc v Mayes,** HL(E) [2001] ICR 544

Scheme for employees of non-associated employers divided into sections each covering one employer — Some sections in surplus and some in deficit — Proposal for payments to employers of sections in surplus after making statutory provision for members in employer's section — Whether each section "qualifying scheme" for purposes of such provision — Whether statutory provision required for all members of scheme before any payments to employers — Winding up begun prior to commencement of new statutory regime — Whether trustee to comply with notice provisions of new regime — Pension Schemes Act 1993, ss 102(2), 108 — Pensions Act 1995, s 76 — Pensions Act 1995 (Commencement No 10) Order 1997, art 6 **BEC Pension Trustee Ltd v Sheppeck,** Etherton J [2002] ICR 1343

TRUSTS—*continued*

Pension scheme—*continued*

Underprovision

Contributions based on employees' salaries — Trustee power to adjust benefits by reference to actuarial valuation of fund — Benefits calculated by reference to contributions and any bonuses or reductions made by trustee — Whether "money purchase scheme" — Whether power to reduce benefits applicable to pensions already in payment — Whether "power . . . to modify" scheme — Pension Schemes Act 1993, s 181 — Pensions Act 1995, ss 56(2)(a), 67
Aon Trust Corpn v KPMG, CA [2006] ICR 18

Employer giving trustees notice to terminate scheme — Trustees' power to order company to pay "appropriate" contribution — Whether exercisable during notice period to make good shortfall **Capital Cranfield Trustees Ltd v Pinsent Curtis,** CA [2005] ICR 1767

Valuation showing significant shortfall — Employers unable to meet statutory debt owed for shortfall — Whether permissible for trustee to compromise debt — Trustee Act 1925, s 15 — Pensions Act 1995, ss 60, 75
Bradstock Group Pension Scheme Trustees Ltd v Bradstock Group plc, Charles Aldous QC [2002] ICR 1427

Variation

Proposal for transfer of accrued rights to another scheme without members' consent on employer's withdrawal from scheme — Whether permissible — Pensions Act 1995, s 67(2) — Occupational Pension Schemes (Preservation of Benefits) Regulations 1991, reg 12(2)
Merchant Navy Ratings Pension Fund Trustees Ltd v Chambers, Blackburne J [2002] ICR 359

Scheme providing for amendment by trustees by writing "under hand" — Retirement age for female members raised to that for male members by unsigned documents — Whether valid amendment — Whether group estoppel precluding members from relying on absence of valid amendment — Priority of payments on winding-up — Pensions Act 1995, s 73(3)(b) (as amended by Occupational Pension Schemes (Winding Up) (Amendment) Regulations 1996, reg 3) **Trustee Solutions Ltd v Dubery,** Lewison J [2007] ICR 412

Statutory

Care Standards Tribunal

Statutory inquiry into child's death finding social worker guilty of misconduct — Social worker placed on list of those unsuitable to work with children — Appeal to Care Standards Tribunal — Whether tribunal bound by findings of statutory inquiry — Protection of Children Act 1999, s 4(1)(3) **Secretary of State for Education and Skills v Mairs,** Leveson J [2005] ICR 1714

VICARIOUS LIABILITY

Employment

Course of employment

Doorman at nightclub engaging in violent incident with customers and leaving premises after being attacked — Claimant stabbed by doorman returning to club's vicinity and seeking revenge — Whether club owner vicariously liable — Whether sufficient connection between act of stabbing and work doorman employed to do
Mattis v Pollock (trading as Flamingos Nightclub), CA [2003] ICR 1335

Warden of school boarding house sexually abusing residents — Whether employers vicariously liable — Whether sufficient connection between acts of abuse and work warden employed to do **Lister v Hesley Hall Ltd,** HL(E) [2001] ICR 665

Harassment

Employee complaining of harassment by departmental manager in breach of statutory duty — Whether employer vicariously liable — Protection from Harassment Act 1997, ss 1, 3, 10(1)
Majrowski v Guy's and St Thomas's NHS Trust, CA [2005] ICR 977
HL(E) [2006] ICR 1199

Negligence

Damage caused to factory by negligence of workman supplied to sub-contractor on labour-only basis — Work being carried out under sub-contractor's supervision — Whether workman's employer or sub-contractor vicariously liable for negligence — Whether joint liability possible — Appropriate division of responsibility — Civil Liability (Contribution) Act 1978, s 2
Viasystems (Tyneside) Ltd v Thermal Transfer (Northern) Ltd, CA [2006] ICR 327

Police

Assault

Off-duty constable assaulting claimant and locking him in police van — Whether assault committed in purported performance of functions as constable — Whether chief constable vicariously liable — Police Act 1996, s 88 **Weir v Chief Constable of Merseyside Police,** CA [2003] ICR 708

VICARIOUS LIABILITY—*continued*

Victimisation

Race

Applicant's complaint against employer of racial discrimination — Employer refusing to provide reference while complaint pending — Complaint of victimisation — Appropriate comparator — Whether refusal "by reason that" applicant had made complaint — Race Relations Act 1976, s 2(1)(a) **Chief Constable of the West Yorkshire Police v Khan,** HL(E) [2001] ICR 1065

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CA [2002] ICR 1507
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Brook v Haringey London Borough Council [1992] IRLR 478, EAT. **Disapproved,** *Allonby v Accrington and Rossendale College* [2001] ICR 1189, CA

Brown v Secretary of State for Scotland (Case 197/86) [1988] ECR 3205, 3242, para 18, ECJ. **Dicta considered,** *Grzelczyk v Centre public d'aide sociale Ottignies-Louvain-la Neuve* (C-184/99) [2002] ICR 566, ECJ

Brunnhofer v Bank der Österreichischen Postparkasse AG (Case C-381/99) [2001] All ER (EC) 693; [2001] ECR I-4961; [2001] IRLR 571, ECJ. **Applied,** *Sharp v Caledonia Group Services Ltd* [2006] ICR 218, EAT. **Considered,** *Parliamentary Comr for Administration and the Health Service Comrs v Fernandez* [2004] ICR 123, EAT; *Villalba v Merrill Lynch & Co Inc* [2007] ICR 469, EAT

Buckland v Watts [1970] 1 QB 27; [1969] 3 WLR 92; [1969] 2 All ER 985, CA. **Applied,** *Kingston upon Hull City Council v Dunnachie (No 3)* [2004] ICR 227, EAT

Bull v Nottinghamshire and City of Nottingham Fire and Rescue Authority [2006] EWHC 2749 (QB). **Decision of Butterfield J affirmed** [2007] ICR 1631, CA

Burns v Royal Mail Group plc (formerly Consignia plc) [2004] ICR 1103, EAT. **Approved,** *Barke v SEETEC Business Technology Centre Ltd* [2005] ICR 1373, CA

Burton v De Vere Hotels Ltd [1997] ICR 1, EAT. **Disapproved,** *Macdonald v Ministry of Defence; Pearce v Governing Body of Mayfield Secondary School* [2003] ICR 937, HL(E & Sc)

Burton v Field Sons & Co Ltd [1977] ICR 106, EAT. **Approved,** *Consignia plc (formerly The Post Office) v Sealy* [2002] ICR 1193, CA

Butler v Wildin [1989] STC 22; 61 TC 666. **Approved,** *Jones v Garnett* [2007] ICR 1259, HL(E)

Bwllfa and Merthyr Dare Steam Collieries (1891) Ltd v Pontypridd Waterworks Co [1903] AC 426, 431, HL(E). **Applied,** *McDougall v Richmond Adult Community College* [2007] ICR 1567, EAT. **Dicta of Lord Macnaghten considered,** *Latchman v Reed Business Information Ltd* [2002] ICR 1453, EAT

Byrne Bros (Formwork) Ltd v Baird [2002] ICR 667, EAT. **Considered,** *Redrow Homes (Yorkshire) Ltd v Wright* [2004] ICR 1126, CA

CELTEC Ltd v Astley [2002] ICR 1289, CA. **Decision of the Court of Appeal affirmed on different grounds** [2006] ICR 992, HL(E)

Cable & Wireless plc v Muscat [2006] ICR 975, CA. **Considered,** *James v Greenwich London Borough Council* [2007] ICR 577, EAT

Camden and Islington Community Services NHS Trust v Kennedy [1996] IRLR 381, EAT. **Distinguished,** *Peters v Sat Katar Co Ltd* [2003] ICR 1574, CA

Campbell v Frisbee [2002] EMLR 656. **Decision of Lightman J reversed** [2003] ICR 141, CA

Canada Life Ltd v Gray [2004] ICR 673, EAT. **Overruled,** *Inland Revenue Comrs v Ainsworth* [2005] ICR 1149, CA

Cantor Fitzgerald International v Callaghan [1999] ICR 639; [1999] 2 All ER 411, CA. **Applied,** *New Southern Railway Ltd v Quinn* [2006] ICR 761, EAT

Capital Cranfield Trustees Ltd v Pinsent Curtis [2005] Pens LR 251. **Decision of Lindsay J affirmed** [2005] ICR 1767, CA

Capital Foods Retail Ltd v Corrigan [1993] IRLR 430, EAT (Sc). **Distinguished,** *Peters v Sat Katar Co Ltd* [2003] ICR 1574, CA

Care First Partnership Ltd v Roffey [2001] ICR 87, CA. **Applied,** *Balamoody v United Kingdom Central Council for Nursing, Midwifery and Health Visiting* [2002] ICR 646, CA

Carmichael v National Power plc [1999] ICR 1226; [1999] 1 WLR 2042; [1999] 4 All ER 897, HL(E). **Applied,** *Montgomery v Johnson Underwood Ltd* [2001] ICR 819, CA. **Considered,** *Franks v Reuters Ltd* [2003] ICR 1166, CA. **Distinguished,** *Cornwall County Council v Prater* [2006] ICR 731, CA

Carr v Allen-Bradeley Electronics Ltd [1980] ICR 603, EAT. **Overruled,** *Kovacs v Queen Mary and Westfield College* [2002] ICR 919, CA

Carson v Carson and Stoyek [1964] 1 WLR 511; [1964] 1 All ER 681. **Considered,** *Meteorological Office v Edgar* [2002] ICR 149, EAT

Carter v Ahsan [2004] ICR 938, EAT. **Decision of the Employment Appeal Tribunal reversed** [2005] ICR 1817, CA

Cartledge v E Jopling & Sons Ltd [1963] AC 758; [1963] 2 WLR 210; [1963] 1 All ER 341, HL(E). **Considered,** *Rothwell v Chemical & Insulating Co Ltd* [2006] ICR 1458, CA

Cartledge v E Jopling & Sons Ltd [1963] AC 758; [1963] 2 WLR 210; [1963] 1 All ER 341, HL(E). **Considered,** *Rothwell v Chemical & Insulating Co Ltd* [2007] ICR 1745, HL(E)

Carver v Saudi Arabian Airlines [1999] ICR 991, CA. **Applied,** *Saggar v Ministry of Defence* [2004] ICR 1708, EAT. **Considered,** *Saggar v Ministry of Defence* [2005] ICR 1073, CA. **Doubted,** *Lawson v Serco Ltd* [2006] ICR 250, HL(E)

Cast v Croydon College [1998] ICR 500, 515, CA. **Applied,** *Comr of Police of the Metropolis v Harley* [2001] ICR 927, EAT. **Dicta of Auld LJ doubted,** *Meikle v Nottinghamshire County Council* [2005] ICR 1, CA

Catherall v Michelin Tyres plc [2003] ICR 28, EAT. **Approved,** *Meikle v Nottinghamshire County Council* [2005] ICR 1, CA

Cement Makers' Federation Agreement (No 2), In re [1974] ICR 445; [1974] 2 All ER 219, RP Ct (E & W). **Considered,** *In re Medicaments and Related Classes of Goods (No 3)* [2001] ICR 306, RP Ct

Centre public d'aide sociale de Courcelles v Lebon (Case 316/85) [1987] ECR 2811, 2839, para 26, ECJ. **Dicta considered,** *Collins v Secretary of State for Work and Pensions* (Case C-138/02) [2005] ICR 37, ECJ

Cerberus Software Ltd v Rowley [2000] ICR 35, EAT. **Decision of the Employment Appeal Tribunal reversed** [2001] ICR 376, CA

Chacón Navas v Eurest Colectividades SA (Case C-13/05) [2007] ICR 1; [2007] All ER (EC) 59; [2006] ECR I-6467, ECJ. **Applied,** *Paterson v Comr of Police of the Metropolis* [2007] ICR 1522, EAT

Chadwick v Clarke (1845) 1 CB 700. **Considered,** *Trustee Solutions Ltd v Dubery* [2007] ICR 412

Chamberlin v Emokpae [2004] ICR 1476, EAT. **Decision of the Employment Appeal Tribunal affirmed** [2005] ICR 931, CA

Chamberlin v Emokpae [2004] ICR 1476, para 38, EAT. **Dicta of Judge McMullen QC disapproved,** *Igen Ltd (formerly Leeds Careers Guidance) v Wong* [2005] ICR 931, CA

Chanel Ltd v Woolworth & Co Ltd [1981] 1 WLR 485; [1981] 1 All ER 745, CA. **Applied,** *Goldman Sachs Services Ltd v Montali* [2002] ICR 1251, EAT

Chapman v Stone [1994] IRLR 124, CA. **Applied,** *Ahuja v Inghams (Accountants)* [2002] ICR 1485, CA

Charlton v Charlton Thermosystems (Romsey) Ltd [1995] ICR 56, EAT. **Considered,** *Atos Origin IT Service UK Ltd v Haddock* [2005] ICR 277, EAT

Chatterjee v City and Hackney Community Services NHS Trust (1998) 49 BMLR 55. **Considered,** *Skidmore v Dartford and Gravesham NHS Trust* [2001] ICR 911, EAT. **Disapproved,** *Saeed v Royal Wolverhampton Hospitals NHS Trust* [2001] ICR 903, CA

Chaudhary v Royal College of Surgeons [2003] ICR 1510, CA. **Applied,** *Chaudhary v Specialist Training Authority Appeal Panel (No 2)* [2005] ICR 1086, CA

Cheesman v R Brewer Contracts Ltd [2001] IRLR 144, paras 10 and 11, EAT. **Dicta of Lindsay J approved,** *Wain v Guernsey Ship Management Ltd* [2007] ICR 1350, CA

Chief Adjudication Officer v Foster [1993] AC 754; [1993] 2 WLR 292; [1993] 1 All ER 705, HL(E). **Applied,** *Howker v Secretary of State for Work and Pensions* [2003] ICR 405, CA

Chief Constable of Bedfordshire Police v Liversidge [2002] IRLR 15, EAT. **Decision of the Employment Appeal Tribunal affirmed** [2002] ICR 1135, CA

Chief Constable of Bedfordshire Police v Liversidge [2002] IRLR 15, EAT; [2002] ICR 1135, CA. **Distinguished,** *Chief Constable of Cumbria v McGlennon* [2002] ICR 1156, EAT

Chief Constable of Bedfordshire Police v Liversidge [2002] ICR 1135, CA. **Considered,** *Comr of Police of the Metropolis v Hendricks* [2003] ICR 530, CA. **Distinguished,** *Chief Constable of Kent County Constabulary v Baskerville* [2003] ICR 1463, CA

Chief Constable of Cumbria v McGlennon [2002] ICR 1156, CA. **Followed,** *Yearwood v Comr of Police of the Metropolis* [2004] ICR 1660, EAT. **Approved,** *Chief Constable of Kent County Constabulary v Baskerville* [2003] ICR 1463, CA

Chief Constable of the Royal Ulster Constabulary v Seargeant A [2000] NI 261, 272, CA(NI). **Dictum of Carswell LCJ not applied,** *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337, HL(NI)

Chief Constable of the West Yorkshire Police v A [2001] ICR 128, EAT. **Considered,** *X v Comr of Police of the Metropolis* [2003] ICR 1031, EAT

Chief Constable of the West Yorkshire Police v A (No 2) [2002] ICR 552, EAT. **Decision of the Employment Appeal Tribunal reversed** [2003] ICR 161, CA

Chief Constable of the West Yorkshire Police v A (No 2) [2003] ICR 161; [2003] 1 All ER 255, CA. **Decision of the Court of Appeal affirmed** [2004] ICR 806, HL(E)

Chief Constable of the West Yorkshire Police v A (No 2) [2003] ICR 161; [2003] 1 All ER 255, CA. **Considered,** *Croft v Royal Mail Group plc (formerly Consignia plc)* [2003] ICR 1425, CA

Chief Constable of the West Yorkshire Police v Khan [2000] ICR 1169, CA. **Decision of the Court of Appeal reversed** [2001] ICR 1065, HL(E)

Chief Constable of the West Yorkshire Police v Khan [2000] ICR 1169, CA. **Applied,** *Brown v TNT Express Worldwide (UK) Ltd* [2001] ICR 182, CA

Chief Constable of the West Yorkshire Police v Khan [2001] ICR 1065, paras 31 and 59; [2001] 1 WLR 1947; [2001] 4 All ER 834, HL(E). **Applied,** *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337, HL(NI). **Dicta of Lord Nicholls of Birkenhead and Lord Hoffmann applied,** *Derbyshire v St Helens Metropolitan Borough Council* [2006] ICR 90, CA. **Considered,** *Derbyshire v St Helens Metropolitan Borough Council (Equal Opportunities Commission intervening)* [2007] ICR 841, HL(E)

Chinn v Hochstrasser [1981] AC 533; [1981] 2 WLR 14; [1981] 1 All ER 189, HL(E). **Applied,** *Jones v Garnett* [2007] ICR 1259, HL(E)

Chohan v Derby Law Centre [2004] IRLR 685, EAT. **Considered,** *Baynton v South West Trains Ltd* [2005] ICR 1730, EAT

Choudhury v General Medical Council [2004] Lloyd's Rep Med 251, PC. **Distinguished,** *R (Malik) v Waltham Forest Primary Care Trust* [2006] ICR 1111

Clark v BET plc [1997] IRLR 348, 349, EAT. **Dicta of Timothy Walker J approved,** *Horkulak v Cantor Fitzgerald International* [2005] ICR 402, CA

Clark v Midland Packaging Ltd [2005] 2 All ER 266, EAT. **Not followed,** *Woodward v Abbey National plc (No 2)* [2005] ICR 1702, EAT

Clark v Nomura International plc [2000] IRLR 766, 775. **Dicta of Burton J approved,** *Horkulak v Cantor Fitzgerald International* [2005] ICR 402, CA

Clark v Novacold Ltd [1999] ICR 951; [1999] 2 All ER 977, CA. **Applied,** *McAuley Catholic High School v C* [2004] ICR 1563; *O'Hanlon v Revenue and Customs Comrs* [2006] ICR 1579, EAT. **Considered,** *Baynton v South West Trains Ltd* [2005] ICR 1730, EAT; *O'Hanlon v Revenue and Customs Comrs* [2007] ICR 1359, CA

Clark v Perks (No 2) [2000] STC 428. **Decision of Ferris J reversed** [2002] ICR 302, CA

Clarke v Arriva Kent Thameside Ltd (unreported) 25 July 2001; [Recent Points [2001] ICR Part 10], EAT. **Considered,** *Gladwell v Secretary of State for Trade and Industry* [2007] ICR 264, EAT

Clunis v Camden and Islington Health Authority [1998] QB 978; [1998] 2 WLR 902; [1998] 3 All ER 180, CA. **Applied,** *Hewison v Meridian Shipping Services PTE Ltd* [2003] ICR 766, CA

Cobham v Frett [2001] 1 WLR 1775, PC. **Applied,** *Kwamin v Abbey National plc* [2004] ICR 841, EAT. **Distinguished,** *Connex South Eastern Ltd v Bangs* [2005] ICR 763, CA

Cole (Stanley) (Wainfleet) Ltd v Sheridan [2003] ICR 297, EAT. **Decision of the Employment Appeal Tribunal affirmed** [2003] ICR 1449, CA

Collins v Secretary of State for Work and Pensions (Case C-138/02) [2005] ICR 37; [2005] QB 145; [2004] 3 WLR 1236; [2004] All ER (EC) 1005; [2004] ECR I-2703, ECJ. **Applied,** *Colllins v Secretary of State for Work and Pensions* [2006] ICR 1033, CA

Commission of the European Communities v Kingdom of Belgium (Case C-278/94) [1996] ECR I-4307, 4342–4343, paras 39 and 40, ECJ. **Dicta considered,** *Collins v Secretary of State for Work and Pensions* (Case C-138/02) [2005] ICR 37, ECJ

Comr of Police of the Metropolis v Harley [2001] ICR 927, EAT. **Not followed,** *Catherall v Michelin Tyres plc* [2003] ICR 28, EAT. **Overruled,** *Meikle v Nottinghamshire County Council* [2005] ICR 1, CA

Comr of Police of the Metropolis v Lowrey-Nesbitt [1999] ICR 401, EAT. **Considered,** *Spence v British Railways Board* [2001] ICR 232, EAT

Connex South Eastern Ltd v Bangs [2004] ICR 841, EAT. **Decision of the Employment Appeal Tribunal reversed** [2005] ICR 763, CA

Connolly v Sellers Arenascene Ltd [2001] ICR 760, CA. **Applied,** *Gladwell v Secretary of State for Trade and Industry* [2007] ICR 264, EAT

Consignia plc (formerly The Post Office) v Sealy [2002] ICR 1193; [2002] 3 All ER 801, CA. **Explained,** *Initial Electronic Security Systems Ltd v Avdic* [2005] ICR 1598, EAT. **Distinguished,** *Tyne and Wear Autistic Society v Smith* [2005] ICR 663, EAT

Cooke v Secretary of State for Social Security [2002] 3 All ER 279, 285 CA. **Dicta of Hale LJ followed,** *Scott v Inland Revenue Comrs* [2004] ICR 1410, CA

Coote v Granada Hospitality Ltd (Case C-185/97) [1999] ICR 100; [1998] ECR I-5199, ECJ. **Applied,** *Chief Constable of West Yorkshire Police v A* [2001] ICR 128, EAT. **Distinguished,** *Rhys-Harper v Relaxion Group plc* [2001] ICR 1176, CA

Coote v Granada Hospitality Ltd (No 2) [1999] ICR 942, 950, CA. **Approved,** *Rhys-Harper v Relaxion Group plc; D'Souza v Lambeth London Borough Council; Jones v 3M Healthcare Ltd* [2003] ICR 867, HL(E). **Dicta of Morison J disapproved,** *Rhys-Harper v Relaxion Group plc* [2001] ICR 1176, CA

Coral Squash Clubs Ltd v Matthews [1979] ICR 607, EAT. **Applied,** *Logan v Customs and Excise Comrs* [2004] ICR 1, CA

Cornelius v University College of Swansea [1987] IRLR 141, CA. **Applied,** *Chief Constable of the West Yorkshire Police v Khan* [2001] ICR 1065, HL(E)

Corr v IBC Vehicles Ltd [2005] EWHC 3409 (QB). **Decision of Nigel Baker QC sitting as a deputy judge of the Queen's Bench Division reversed** [2006] ICR 1138, CA

Coudert Bros v Normans Bay Ltd (formerly Illingworth Morris Ltd) [2004] EWCA Civ 215, The Times 24 March 2004, CA. **Followed,** *Prison Service v Beart (No 2)* [2005] ICR 1206, CA

Cox Toner (W E) (International) Ltd v Crook [1981] ICR 823, EAT. **Approved,** *Henry v London General Transport Services Ltd* [2002] ICR 910, CA

Cozens v Brutus [1973] AC 854, 861; [1972] 3 WLR 521; [1972] 2 All ER 1297, HL(E). **Dicta of Lord Reid applied,** *Clark v Perks (No 2)* [2002] ICR 302, CA

Crank v Her Majesty's Stationery Office [1985] ICR 1, EAT. **Overruled,** *Fitzgerald v University of Kent at Canterbury* [2004] ICR 737, CA

Craven-Ellis v Canons Ltd [1936] 2 KB 403; [1936] 2 All ER 106, CA. **Considered,** *Eastbourne Borough Council v Foster* [2002] ICR 234, CA

Crehan v Inntrepreneur Pub Co (CPC) (Office of Fair Trading intervening) [2004] Eu LR 693, CA. **Decision of the Court of Appeal reversed** [2006] ICR 1344, HL(E)

Cresswell v Board of Inland Revenue [1984] ICR 508; [1984] 2 All ER 713. **Distinguished,** *Bull v Nottinghamshire and City of Nottingham Fire and Rescue Authority* [2007] ICR 1631, CA

Creutzfeldt-Jakob Disease Litigation Group B Plaintiffs v Medical Research Council [2000] Lloyd's Rep Med 161. **Approved,** *Rothwell v Chemical & Insulating Co Ltd* [2006] ICR 1458, CA. **Considered,** *Rothwell v Chemical & Insulating Co Ltd* [2007] ICR 1745, HL(E)

Croft v Royal Mail Group plc (formerly Consignia plc) [2002] IRLR 851, EAT. **Decision of the Employment Appeal Tribunal affirmed** [2003] ICR 1425, CA

Crofts v Cathay Pacific Airways Ltd [2005] ICR 1436, CA. **Decision of the Court of Appeal affirmed** [2006] ICR 250, HL(E)

Crompton (trading as David Crompton Haulage) v Department of Transport North Western Traffic Area [2003] RTR 517, CA. **Applied,** *R (Malik) v Waltham Forest Primary Care Trust* [2006] ICR 1111. **Not followed,** *R (Malik) v Waltham Forest NHS Primary Care Trust* [2007] ICR 1101, CA

Crossland v Hawkins [1961] Ch 537; [1961] 3 WLR 202; [1961] 2 All ER 812, CA. **Applied,** *Jones v Garnett* [2007] ICR 1259, HL(E). **Distinguished,** *Jones v Garnett* [2006] ICR 690, CA

Customs and Excise Comrs v Elm Milk Ltd [2005] STC 776. **Decision of Park J affirmed** [2006] ICR 880, CA

Customs and Excise Comrs v Upton (trading as Fagomatic) [2002] STC 640, CA. **Distinguished,** *Customs and Excise Comrs v Elm Milk Ltd* [2006] ICR 880, CA

Dacas v Brook Street Bureau (UK) Ltd [2003] IRLR 190, EAT. **Decision of the Employment Appeal Tribunal reversed** [2004] ICR 1437, CA

Dacas v Brook Street Bureau (UK) Ltd [2004] ICR 1437, paras 18, 68, 75, CA. **Dicta of Mummery and Sedley LJJ applied,** *Cable & Wireless plc v Muscat* [2006] ICR 975, CA. **Considered,** *Cairns v Visteon UK Ltd* [2007] ICR 616, EAT; *James v Greenwich London Borough Council* [2007] ICR 577, EAT

Darker v Chief Constable of West Midlands Police [2001] 1 AC 435; [2000] 3 WLR 747; [2000] 4 All ER 193, HL(E). **Applied,** *Meadow v General Medical Council* [2007] ICR 701, CA

Darnton v University of Surrey [2003] ICR 615, EAT. **Approved,** *Babula v Waltham Forest College* [2007] ICR 1026, CA

Davies v Presbyterian Church of Wales [1986] ICR 280; [1986] 1 WLR 323; [1986] 1 All ER 705, HL(E). **Considered,** *Percy v Board of National Mission of the Church of Scotland* [2006] ICR 134, HL(Sc)

Daw v Intel Corpn (UK) Ltd [2006] EWHC 1097 (QB). **Decision of Goldring J affirmed** [2007] ICR 1318, CA

de Haney v Brent MIND [2004] ICR 348, CA. **Considered,** *Rabahallah v British Telecommunications plc* [2005] ICR 440, EAT

Dedman v British Building & Engineering Appliances Ltd [1974] ICR 53; [1974] 1 WLR 171; [1974] 1 All ER 520, CA. **Applied,** *Marks & Spencer plc v Williams-Ryan* [2005] ICR 1293, CA

Defrenne v Sabena (Case 149/77) [1978] ECR 1365, ECJ. **Applied,** *Jämställdhetsombudsmannen v Örebro Läns Landsting* (Case C-236/98) [2001] ICR 249, ECJ; *South Ayrshire Council v Morton* [2002] ICR 956, Ct of Sess

Delaney v Staples (trading as De Monfort Recruitment) [1992] ICR 483; [1992] 1 AC 687; [1992] 2 WLR 451; [1992] 1 All ER 944, HL(E). **Applied,** *In re Leeds United Association Football Club Ltd* [2007] ICR 1688

Delaney v Staples (trading as De Montfort Recruitment) [1991] ICR 331; [1991] 2 QB 47; [1991] 2 WLR 627; [1991] 1 All ER 609, CA; [1992] ICR 483; [1992] 1 AC 687; [1992] 2 WLR 451; [1992] 1 All ER 944, HL(E). **Considered,** *Coors Brewers Ltd v Adcock* [2007] ICR 983, CA

Delimitis v Henninger Bräu AG (Case C-234/89) [1991] ECR I-935, ECJ. **Considered,** *Crehan v Inntrepreneur Co (CPC) (Office of Fair Trading intervening)* [2006] ICR 1344, HL(E)

Del Monte Foods Ltd v Mundoon [1980] ICR 694, EAT. **Followed,** *Ramdoolar v Bycity Ltd* [2005] ICR 368, EAT

Deman v Association of University Teachers (unreported) 29 September 2005, para 11, EAT. **Dicta of Judge McMullen QC not followed,** *Ansar v Lloyds TSB Bank plc* [2006] ICR 1565, EAT

Denham v Midland Employers' Mutual Assurance Ltd [1955] 2 QB 437; [1955] 3 WLR 84; [1955] 2 All ER 561, CA. **Explained,** *Viasystems (Tyneside) Ltd v Thermal Transfer (Northern) Ltd* [2006] ICR 327, CA

Department for Environment Food and Rural Affairs v Robertson [2004] ICR 1289, EAT. **Decision of the Employment Appeal Tribunal affirmed** [2005] ICR 750, CA

Department of Transport v Gallacher [1994] ICR 967, 974–975, CA. **Dicta of Neill LJ applied,** *Southwark London Borough Council v Whillier* [2001] ICR 1016, CA

Derby Specialist Fabrication Ltd v Burton [2001] ICR 833; [2001] 2 All ER 840, EAT. **Considered,** *Catherall v Michelin Tyres plc* [2003] ICR 28, EAT; *Meikle v Nottinghamshire County Council* [2005] ICR 1, CA

Derbyshire v St Helens Metropolitan Borough Council [2004] IRLR 851, EAT. **Decision of the Employment Appeal Tribunal reversed** [2006] ICR 90, CA

Derbyshire v St Helens Metropolitan Borough Council [2006] ICR 90, CA. **Decision of the Court of Appeal reversed** [2007] ICR 841, HL(E)

Devis (W) & Sons Ltd v Atkins [1977] ICR 662; [1977] AC 931; [1977] 3 WLR 214; [1977] 3 All ER 40, HL(E). **Applied,** *Melia v Magna Kansei Ltd* [2005] ICR 874, EAT

D'Hoop v Office national de l'employoi (Case C-224/98) [2004] ICR 137, para 38; [2003] All ER (EC) 527; [2002] ECR I-6191, ECJ. **Dicta applied,** *Collins v Secretary of State for Work and Pensions* [2006] ICR 1033, CA

Dickie v Cathay Pacific Airways Ltd [2004] ICR 1733, EAT. **Decision of the Employment Appeal Tribunal reversed in part** [2005] ICR 1436, CA

Diosynth Ltd v Thomson [2006] IRLR 284, Ct of Sess. **Followed,** *Airbus UK Ltd v Webb* [2007] ICR 956, EAT

Dobbs v Triodos Bank NV [2005] EWCA Civ 468, para 7, CA. **Dicta of Chadwick LJ applied,** *Ansar v Lloyds TSB Bank plc* [2006] ICR 1565, EAT

Donovan v Laing Wharton & Down Construction Syndicate Ltd [1893] 1 QB 629, CA. **Explained,** *Viasystems (Tyneside) Ltd v Thermal Transfer (Northern) Ltd* [2006] ICR 327, CA

Dorling v Sheffield City Council [2002] ELR 367. **Considered,** *R (Verner) v Derby City Council* [2004] ICR 535

Dormers Wells Infant School v Gill (unreported) 16 July 1999, EAT. **Overruled,** *Wall v British Compressed Air Society* [2004] ICR 408

Dorney v Chippenham College (unreported) 28 May 1997, EAT. **Overruled,** *Kovacs v Queen Mary and Westfield College* [2002] ICR 919, CA

Driskel v Peninsula Business Services Ltd [2000] IRLR 151, EAT. **Followed,** *R (Equal Opportunities Commission) v Secretary of State for Trade and Industry* [2007] ICR 1234, CA. **Considered,** *Derby Specialist Fabrication Ltd v Burton* [2001] ICR 833, EAT

D'Souza v Lambeth London Borough Council [2001] EWCA Civ 794, CA. **Decision of the Court of Appeal affirmed** [2003] ICR 867, HL(E)

D'Souza v Lambeth London Borough Council [2001] EWCA Civ 794, CA. **Applied,** *Lawal v Northern Spirit Ltd* [2002] ICR 486, EAT

Dubai Aluminium Co Ltd v Salaam [2003] 2 AC 366; [2002] 3 WLR 1913; [2003] 1 All ER 97, HL(E). **Applied,** *Mattis v Pollock (trading as Flamingos Nightclub)* [2003] ICR 1335, CA; *Majrowski v Guy's and St Thomas's NHS Trust* [2005] ICR 977, CA

Dugmore v Swansea NHS Trust [2003] ICR 574; [2003] 1 All ER 333, CA. **Distinguished,** *R v HTM Ltd* [2006] ICR 1383, CA

Dunk v George Waller & Son Ltd [1970] 2 QB 163; [1970] 2 WLR 1241; [1970] 2 All ER 630, CA. **Applied,** *Flett v Matheson* [2006] ICR 673, EAT. **Distinguished,** *Flett v Matheson* [2005] ICR 1134, EAT

Dunn v British Coal Corpn [1993] ICR 591, CA. **Considered,** *Bennett v Compass Group UK and Ireland Ltd* [2002] ICR 1177, CA

Dunnachie v Kingston upon Hull City Council [2003] ICR 1294, EAT. **Decision of the Employment Appeal Tribunal reversed** [2004] ICR 481, CA

Dunnachie v Kingston upon Hull City Council [2004] ICR 481; [2004] 2 All ER 501, CA. **Decision of the Court of Appeal reversed** [2004] ICR 1052, HL(E)

Dunnachie v Kingston upon Hull City Council [2004] ICR 1052, 1061; [2005] 1 AC 226; [2004] 3 WLR 410; [2004] 3 All ER 1011, HL(E). **Dicta of Lord Steyn applied,** *Langley v Burlo* [2006] ICR 850, EAT. **Considered,** *Langley v Burlo* [2007] ICR 390, CA

Du Pont de Nemours (E I) & Co v Dupont [2004] FSR 293, CA. **Applied,** *Meadow v General Medical Council* [2007] ICR 701, CA

Ealing Hammersmith and Hounslow Family Health Services Authority v Shukla [1993] ICR 710, EAT. **Followed,** *North Essex Health Authority v David-John* [2004] ICR 112, EAT

Eastwood v Magnox Electric plc (Note) [2003] ICR 520, CA. **Decision of the Court of Appeal reversed** [2004] ICR 1064, HL(E)

Eastwood v Magnox Electric plc (Note) [2003] ICR 520, CA. **Distinguished,** *McCabe v Cornwall County Council* [2003] ICR 501, CA

Eastwood v Magnox Electric plc [2004] ICR 1064; [2005] 1 AC 503; [2004] 3 WLR 322; [2004] 3 All ER 991, HL(E). **Considered,** *GAB Robins (UK) Ltd v Triggs* [2007] ICR 1424, EAT

Eaton Ltd v Nuttall [1977] ICR 272; [1977] 1 WLR 549; [1977] 3 All ER 1131, EAT. **Considered,** *Department for Environment Food and Rural Affairs v Robertson* [2004] ICR 1289, EAT

Edge v Pensions Ombudsman [2000] ICR 748; [2000] Ch 602; [2000] 3 WLR 79; [1999] 4 All ER 546, CA. **Considered,** *Moore's (Wallisdown) Ltd v Pensions Ombudsman* [2002] ICR 773

Edwards v Bairstow [1956] AC 14, 36; [1955] 3 WLR 410; [1955] 3 All ER 48, HL(E). **Applied,** *IBA Healthcare Ltd v Office of Fair Trading* [2004] ICR 1364, CA. **Dicta of Lord Radcliffe applied,** *Clark v Perks (No 2)* [2002] ICR 302, CA

Elliott v Pensions Ombudsman [1998] OPLR 21. **Not followed,** *Moore's (Wallisdown) Ltd v Pensions Ombudsman* [2002] ICR 773

Enderby v Frenchay Health Authority (Case C-127/02) [1994] ICR 112; [1994] 1 All ER 495; [1993] ECR I-5535, ECJ. **Considered,** *Middlesbrough Borough Council v Surtees* [2007] ICR 1644, EAT

Enderby v Frenchay Health Authority (Case C-127/92) [1994] ICR 112; [1994] 1 All ER 495; [1993] ECR I-5535, ECJ. **Applied,** *Nelson v Carillion Services Ltd* [2003] ICR 1256, CA; *Cheshire and Wirral Partnership NHS Trust v Abbott* [2006] ICR 1267, CA

English v Emery Reimbold & Strick Ltd (Practice Note) [2002] 1 WLR 2409, 2419, para 25; [2002] 3 All ER 385, CA. **Applied,** *Barke v SEETEC Business Technology Centre Ltd* [2005] ICR 1373, CA. **Dicta applied,** *Burns v Royal Mail Group plc (formerly Consignia plc)* [2004] ICR 1103, EAT

Essa v Laing Ltd [2003] ICR 1110, EAT. **Decision of the Employment Appeal Tribunal affirmed** [2004] ICR 746, CA

Expro Services Ltd v Smith [1991] ICR 577, EAT. **Considered,** *Alderson v Secretary of State for Trade and Industry* [2004] ICR 512, CA

Facey v Midas Retail Security Ltd [2001] ICR 287, EAT. **Approved,** *Stansbury v Datapulse plc* [2004] ICR 523, CA

Fadipe v Reed Nursing Personnel (Note) [2005] ICR 1760, CA. **Applied,** *Woodward v Abbey National plc (No 1)* [2005] ICR 1750, EAT. **Not followed,** *Woodward v Abbey National plc (No 1)* [2006] ICR 1436, CA

Fairchild v Glenhaven Funeral Services Ltd [2002] ICR 412; [2002] 1 WLR 1052, CA. **Decision of the Court of Appeal reversed** [2002] ICR 798, HL(E)

Fairchild v Glenhaven Funeral Services Ltd [2002] ICR 412; [2002] 1 WLR 1052, CA. **Applied,** *McCook v Lobo* [2003] ICR 89, CA

Fairchild v Glenhaven Funeral Services Ltd [2002] ICR 798; [2003] 1 AC 32; [2002] 3 WLR 89; [2002] 3 All ER 305, HL(E). **Applied,** *Barker v Corus UK Ltd* [2006] ICR 809, HL(E)

Fairhurst Ward Abbotts Ltd v Botes Building Ltd [2004] ICR 919, CA. **Applied,** *Transport and General Workers' Union v Swissport (UK) Ltd* [2007] ICR 1593, EAT

Farah v Comr of Police of the Metropolis [1998] QB 65; [1997] 2 WLR 824; [1997] 1 All ER 289, CA. **Distinguished,** *Chief Constable of Kent County Constabulary v Baskerville* [2003] ICR 1463, CA

Fatnani v General Medical Council [2006] EWHC 1573 (Admin). **Decision of Collins J reversed** [2007] ICR 811, CA

Fédération Française des Sociétés d'Assurance v Ministère de l'Agriculture et de la Pêche (Case C-244/94 [1994] ECR I-4013, ECJ. **Considered,** *Brentjens' Handelsonderneming BV v Stichting Bedrijfspensioenfonds voor de Handel in Bouwmaterialen* (Cases C-115–117/97) [2001] ICR 774, ECJ

Ferguson v Welsh [1987] 1 WLR 1553, 1560; [1987] 3 All ER 777, HL(E). **Applied,** *Fairchild v Glenhaven Funeral Services Ltd* [2002] ICR 412, CA. **Considered,** *Makepeace v Evans Brothers (Reading)* [2001] ICR 241, CA. **Dicta of Lord Keith of Kinkel not applied,** *Gray v Fire Alarm Fabrication Services Ltd* [2007] ICR 247, CA

Ferrotech Ltd, In re; Granville Technology Group Ltd, In re [2005] EWHC 1848 (Ch). **Decision of Etherton J** sub nom *Krasner v McMath* **affirmed** [2006] ICR 205, CA

Fielding (Harold) Ltd v Mansi [1974] ICR 347; [1974] 1 All ER 1035, NIRC. **Not followed,** *Bower v Stevens* [2004] ICR 1582, CA

Fletcher v Comrs of Public Works [2003] IR 465. **Considered,** *Rothwell v Chemical & Insulating Co Ltd* [2006] ICR 1458, CA

Flett v Matheson [2005] ICR 1134, EAT. **Decision of the Employment Appeal Tribunal reversed** [2006] ICR 673, CA

Fogarty v United Kingdom (2001) 34 EHRR 302. **Considered,** *Matthews v Ministry of Defence* [2002] ICR 1003, CA. **Distinguished,** *Matthews v Ministry of Defence* [2003] ICR 247, HL(E)

Foley v Post Office; HSBC Bank plc (formerly Midland Bank plc) v Madden [2000] ICR 1283; [2001] 1 All ER 550, CA. **Followed,** *X v Y* [2004] ICR 1634, CA. **Applied,** *J Sainsbury plc v Hitt* [2003] ICR 111, CA; *X v Y* [2003] ICR 1138, EAT

Foreningen af Arbejdsledere i Danmark v A/S Danmols Inventar (Case 105/84) [1985] ECR 2639, ECJ. **Applied,** *Collino v Telecom Italia SpA* (Case C-343/98) [2002] ICR 38, ECJ

Foreningen af Arbejdsledere i Danmark (acting on behalf of Tellerup) v Daddy's Dance Hall A/S (Case 324/86) [1988] ECR 739, ECJ. **Considered,** *Martin v South Bank University* (Case C-04/01) [2004] ICR 1234, ECJ; *Cross v British Airways plc* [2006] ICR 1239, CA; *Power v Regent Security Services Ltd* [2007] ICR 970, EAT

Forshaw v Archcraft Ltd (Note) [2006] ICR 70, EAT. **Not followed,** *Willow Oak Developments Ltd (trading as Windsor Recruitment) v Silverwood* [2006] ICR 55, EAT. **Disapproved,** *Willow Oak Developments Ltd (trading as Windsor Recruitment) v Silverwood* [2006] ICR 1552, CA

Francovich v Italian Republic (Cases C-6/90 and C-9/90) [1995] ICR 722, 767–768, para 11; [1991] ECR I-5357, ECJ. **Dicta applied,** *Pfeiffer v Deutsches Rotes Kreuz, Kreisverband Waldshut eV* (Cases C-397–403/01) [2005] ICR 1307, ECJ

Fraser v HLMAD Ltd [2006] ICR 1395, CA. **Considered,** *Khan v Heywood & Middleton Primary Care Trust* [2007] ICR 24, CA

Fytche v Wincanton Logistics plc [2003] ICR 1582, CA. **Decision of the Court of Appeal affirmed** [2004] ICR 975, HL(E)

Gallagher v Alpha Catering Services Ltd (trading as Alpha Flight Services) [2004] ICR 1489, EAT. **Decision of the Employment Appeal Tribunal affirmed** [2005] ICR 673, CA

Gallagher v Alpha Catering Services Ltd (trading as Alpha Flight Services) [2005] ICR 673, CA. **Applied,** *MacCartney v Oversley House Management* [2006] ICR 510, EAT

General Council of British Shipping v Deria [1985] ICR 198, EAT. **Followed,** *Stanley Cole (Wainfleet) Ltd v Sheridan* [2003] ICR 297, EAT. **Considered,** *Stanley Cole (Wainfleet) Ltd v Sheridan* [2003] ICR 1449, CA

Gerber Garment Technology Inc v Lectra Systems Ltd [1997] RPC 443, CA. **Considered,** *Bank of Credit and Commerce International SA v Ali (No 2)* [2002] ICR 1258, CA

Ghaidan v Godin Mendoza [2003] Ch 880, para 40; [2003] 2 WLR 478; [2002] 4 All ER 1162, CA. **Observations of Keene LJ doubted,** *R (National Union of Journalists) v Central Arbitration Committee (Secretary of State for Trade and Industry intervening)* [2006] ICR 1, CA

Ghosh v General Medical Council [2001] 1 WLR 1915, PC. **Applied,** *Raschid v General Medical Council* [2007] ICR 811, CA

Gibson v East Riding of Yorkshire Council [2000] ICR 890, CA. **Applied,** *Voteforce Associates Ltd v Quinn* [2002] ICR 1, EAT. **Considered,** *Bamsey v Albon Engineering and Manufacturing plc* [2004] ICR 1083, CA

Gillespie v Northern Health and Social Services Board (Case C-342/93) [1996] ICR 498; [1996] ECR I-475, ECJ. **Applied,** *Alabaster v Woolwich plc* (Case C-147/02) [2005] ICR 695, ECJ; *Hoyland v Asda Stores Ltd* [2005] ICR 1235, EAT(Sc)

Gillies v Secretary of State for Work and Pensions 2004 SLT 14. **Decision of the First Division of the Inner House of the Court of Session affirmed** [2006] ICR 267, HL(Sc)

Glasgow City Council v Marshall [2000] ICR 196, 203; [2000] 1 WLR 333; [2000] 1 All ER 641, HL(Sc). **Dicta of Lord Nicholls of Birkenhead applied,** *Parliamentary Comr for Administration and the Health Service Comrs v Fernandez* [2004] ICR 123, EAT. **Dicta of Lord Nicholls of Birkenhead considered,** *Nelson v Carillion Services Ltd* [2003] ICR 1256, CA

Glenister v Rowe [2000] Ch 76; [1999] 3 WLR 716; [1999] 3 All ER 452, CA. **Considered,** *R (Steele) v Birmingham City Council* [2006] ICR 809, CA

Gloucester Working Men's Club & Institute v James [1986] ICR 603, EAT. **Considered,** *Comr of Police of the Metropolis v Harley* [2001] ICR 927, EAT

Gogay v Hertfordshire County Council [2000] IRLR 703, CA. **Considered,** *McCabe v Cornwall County Council* [2003] ICR 501, CA

Golden Strait Corpn v Nippon Yusen Kubishika Kaisha [2007] 2 AC 353; [2007] 2 WLR 691; [2007] Bus LR 997; [2007] 3 All ER 1, HL(E). **Considered,** *McDougall v Richmond Adult Community College* [2007] ICR 1567, EAT

Goodwin v Patent Office [1999] ICR 302, EAT. **Considered,** *Rugamer v Sony Music Entertainment UK Ltd* [2002] ICR 381, EAT

Goodwin v United Kingdom (2002) 35 EHRR 447. **Applied,** *Chief Constable of the West Yorkshire Police v A (No 2)* [2003] ICR 161, CA. **Considered,** *Croft v Royal Mail Group plc (formerly Consignia plc)* [2003] ICR 1425, CA

Gover v Propertycare Ltd [2006] ICR 1073; [2006] 4 All ER 69, CA. **Considered,** *Thornett v Scope* [2007] ICR 236, CA

Grady v Prison Service [2003] ICR 753, EAT. **Decision of the Employment Appeal Tribunal reversed** [2003] ICR 753, CA

Grady v Prison Service [2003] ICR 753; [2003] 3 All ER 745, CA. **Applied,** *Khan v Trident Safeguards Ltd* [2004] ICR 1591, CA

Gray v Fire Alarm Fabrication Services Ltd [2006] EWHC 849 (QB). **Decision of Judge Marr-Johnson sitting as a judge of the Queen's Bench Division reversed** [2007] ICR 247, CA

Greater Manchester Fire & Civil Defence Authority v Bradley (unreported) 27 April 2001, EAT. **Considered,** *Johnson & Johnson Medical Ltd v Filmer* [2002] ICR 292, EAT

Green v Governing Body of Victoria Road Primary School [2003] ICR 713, EAT. **Decision of the Employment Appeal Tribunal reversed** [2004] ICR 684, CA

Green v Governing Body of Victoria Road Primary School [2004] ICR 684; [2004] 2 All ER 763, CA. **Applied,** *Murphy v Slough Borough Council* [2004] ICR 1163, EAT. **Considered,** *Murphy v Slough Borough Council* [2005] ICR 721, CA

Greenwood v British Airways plc [1999] ICR 969, 977 EAT. **Followed,** *McDougall v Richmond Adult Community College* [2007] ICR 1567, EAT. **Dicta of Judge Peter Clark considered,** *Latchman v Reed Business Information Ltd* [2002] ICR 1453, EAT

Gregg v Scott [2005] 2 AC 176; [2005] 2 WLR 268; [2005] 4 All ER 812, HL(E). **Considered,** *Rothwell v Chemical & Insulating Co Ltd* [2007] ICR 1745, HL(E)

Gridquest Ltd (trading as Select Employment) v Blackburn [2002] ICR 682, EAT. **Decision of the Employment Appeal Tribunal reversed** [2002] ICR 1206, CA

Griffiths v Vauxhall Motors Ltd [2003] EWCA Civ 412, CA. **Considered,** *Robb v Salamis (M & I) Ltd* [2007] ICR 175, HL(Sc)

Grzelczyk v Centre public d'aide sociale Ottignies-Louvain-la-Neuve (Case C-184/99) [2002] ICR 566; [2001] ECR 1–6193, ECJ. **Considered,** *Collins v Secretary of State for Work and Pensions* (Case C-138/02) [2005] ICR 37, ECJ

Guiot, Criminal proceedings against (Case C-272/94) [1996] ECR I-1905, ECJ. **Applied,** *Criminal proceedings against Arblade* (Cases C-369 and 376/96) [2001] ICR 434, ECJ

Gupta v General Medical Council [2002] ICR 785; [2002] 1 WLR 1691, PC. **Applied,** *Raschid v General Medical Council* [2007] ICR 811, CA

Hackney London Borough Council v Usher [1997] ICR 705, EAT. **Considered,** *Care First Partnership Ltd v Roffey* [2001] ICR 87, CA; *Logan v Customs and Excise Comrs* [2004] ICR 1, CA

Halfpenny v IGE Systems Ltd [1999] ICR 834, CA. **Decision of the Court of Appeal reversed** [2001] ICR 73, HL(E)

Hall v Lorimer [1994] ICR 218, 226; [1994] 1 WLR 209; [1994] 1 All ER 250, CA. **Dictum of Nolan LJ applied,** *Synaptek Ltd v Young* [2003] ICR 1149

Hall v Woolston Hall Leisure Ltd [1998] ICR 651, EAT. **Decision of the Employment Appeal Tribunal reversed** [2001] ICR 99, CA

Hall v Woolston Hall Leisure Ltd [2001] ICR 99; [2001] 1 WLR 225; [2000] 4 All ER 787, CA. **Applied,** *Governing Body of Addey and Stanhope School v Vakante* [2003] ICR 290, EAT; *Vakante v Governing Body of Addey and Stanhope School (No 2)* [2005] ICR 231, CA; *Wheeler v Quality Deep Ltd (trading as Thai Royale Restaurant)* [2005] ICR 265, CA. **Distinguished,** *Vakante v Governing Body of Addey and Stanhope School (No 2)* [2004] ICR 279, EAT

Hallam v Avery [2000] ICR 583; [2000] 1 WLR 966, CA. **Decision of the Court of Appeal affirmed on different grounds** [2001] ICR 408, HL(E)

Hammersmith and Fulham London Borough Council v Ladejobi [1999] ICR 673, EAT. **Followed,** *Sian v Abbey National plc* [2004] ICR 55, EAT. **Approved,** *Gdynia America Shipping Lines (London) Ltd v Chelminski* [2004] ICR 1523, CA. **Not followed,** *Scotford v SmithKline Beecham* [2002] ICR 264, EAT

Hammond v Comr of Police of the Metropolis [2004] ICR 1467, CA. **Distinguished,** *PRP Architects v Reid* [2007] ICR 78, CA

Handels- og KontorfunktionÌrenes Forbund i Danmark v Dansk Arbejdsiverforening, acting on behalf of Danfoss (Case 109/88) [1991] ICR 74; [1989] ECR 3199, ECJ. **Applied,** *Health and Safety Executive v Cadman* [2004] ICR 378, EAT; *Cadman v Health and Safety Executive (Equal Opportunities Commission intervening)* (Case C-17/05) [2006] ICR 1623, ECJ. **Considered,** *Health and Safety Executive v Cadman* [2005] ICR 1546, CA

Hanly v Norinchukin International plc [2003] ICR 1416, EAT. **Considered,** *Spicer v Government of Spain* [2005] ICR 213, CA

Hardy v Polk (Leeds) Ltd (Note) [2005] ICR 557, EAT. **Not followed,** *Voith Turbo Ltd v Stowe* [2005] ICR 543, EAT

Harper v Virgin Net Ltd (Note) [2005] ICR 921, CA. **Applied,** *Wise Group v Mitchell* [2005] ICR 896, EAT

Harris's Patent [1985] RPC 19. **Considered,** *LIFFE Administration and Management v Pinkaua* [2007] ICR 1489, CA

Harris v Lord Shuttleworth [1994] ICR 991, CA. **Considered,** *Venables v Hornby* [2002] ICR 81

Harrison v National Coal Board [1951] AC 639, 671; [1951] 1 All ER 1102, HL(E). **Dicta of Lord MacDermott applied,** *Majrowski v Guy's and St Thomas's NHS Trust* [2005] ICR 977, CA. **Considered,** *Majrowski v Guy's and St Thomas's NHS Trust* [2006] ICR 1199, HL(E)

Harrold v Wiltshire Healthcare NHS Trust (unreported) 16 March 1999, EAT. **Not followed,** *Derby Specialist Fabrication Ltd v Burton* [2001] ICR 833, EAT

Harwood-Smart v Caws [2000] PLR 101. **Followed,** *BEC Pension Trustee Ltd v Sheppeck* [2002] ICR 1343

Hatton v Sutherland [2002] ICR 613, paras 23, 29, 43; [2002] 2 All ER 1, CA. **Applied,** *Banks v Ablex Ltd* [2005] ICR 819, CA; *Seafield Holdings Ltd (trading as Seafield Logistics) v Drewett* [2006] ICR 1413, EAT. **Considered,** *Pratley v Surrey County Council* [2004] ICR 159, CA; *Daw v Intel Corpn (UK) Ltd* [2007] ICR 1318, CA. **Dicta considered,** *Hartman v South Essex Mental Health and Community Care NHS Trust* [2005] ICR 782, CA

Healey v Bridgend County Borough Council (Note) [2004] ICR 561, CA. **Followed,** *R (Verner) v Derby City Council)* [2004] ICR 535

Heath v Comr of Police of the Metropolis [2005] ICR 329, CA. **Considered,** *Lake v British Transport Police* [2007] ICR 47, EAT

Hedley Byrne & Co Ltd v Heller & Partners Ltd [1964] AC 465; [1963] 3 WLR 101; [1963] 2 All ER 575, HL(E). **Applied,** *Lennon v Comr of Police of the Metropolis* [2004] ICR 1114, CA

Heinz (H J) & Co Ltd v Kenrick [2000] ICR 491, 498, para 24, EAT. **Considered,** *Wright v Governing Body of Bilton High School* [2002] ICR 1463, EAT. **Dicta of Lindsay J considered,** *Ramdoolar v Bycity Ltd* [2005] ICR 368, EAT

Henderson v Henderson (1843) 3 Hare 100. **Considered,** *Chaudhary v Royal College of Surgeons* [2003] ICR 1510, CA

Henderson v Merrett Syndicates Ltd [1995] 2 AC 145, 181; [1994] 3 WLR 761; [1994] 3 All ER 506, HL(E). **Dicta of Lord Goff of Chieveley applied,** *Lennon v Comr of Police of the Metropolis* [2004] ICR 1114, CA

Henderson v Wakefield Shirt Co Ltd [1997] PIQR P413, CA. **Distinguished,** *Coxall v Goodyear Great Britain Ltd* [2003] ICR 152, CA

Henke v Gemeinde Schierke (Case C-298/94) [1997] ICR 746; [1996] ECR I-4989, ECJ. **Considered,** *Mayeur v Association Promotion de l'Information Messine (APIM)* (Case C-175/99) [2002] ICR 1316, ECJ

Hennessy v Craigmyle & Co Ltd [1986] ICR 461, 470, CA. **Dicta of Sir John Donaldson MR applied,** *Vento v Chief Constable of West Yorkshire Police* [2003] ICR 318, CA. **Observations by Sir John Donaldson MR considered,** *Gover v Propertycare Ltd* [2006] ICR 1073, CA

Henry v London General Transport Services Ltd [2001] IRLR 132, EAT. **Decision of the Employment Appeal Tribunal affirmed** [2002] ICR 910, CA

Hetton Victory Club Ltd v Swainston [1983] ICR 341; [1983] 1 All ER 1179, CA. **Applied,** *Tyne and Wear Autistic Society v Smith* [2005] ICR 663, EAT

High Table Ltd v Horst [1998] ICR 409, CA. **Applied,** *Pitman v Foreign and Commonwealth Office* [2003] ICR 699, EAT

Hill v Clifford [1907] Ch 236, CA. **Considered,** *BUPA Care Homes (CFC Homes) Ltd v Muscolino* [2006] ICR 1329, EAT

Hillsdown Holdings plc v Inland Revenue Comrs [1999] STC 561. **Considered,** *Venables v Hornby* [2002] ICR 81. **Distinguished,** *Venables v Hornby* [2003] ICR 186, CA

Hinckley and Bosworth London Borough Council v Shaw [2000] LGR 9. **Distinguished,** *Barking and Dagenham London Borough Council v Watts* [2003] ICR 1059

Hindle v Birtwistle [1897] 1 QB 192, DC. **Applied,** *Robb v Salamis (M & I) Ltd* [2007] ICR 175, HL(Sc)

Hipwood v Gloucester Health Authority [1995] ICR 999, 1004–1005, CA. **Dicta of McCowan LJ applied,** *Bennett v Compass Group UK and Ireland Ltd* [2002] ICR 1177, CA

Hoechst AG v Commission of the European Communities (Cases 46/87 and 227/88) [1989] ECR 2859, ECJ. **Considered,** *Roquette Frères SA v Directeur général de la concurrence, de la consommation et de la répression des fraudes* (Case C-94/00) [2004] ICR 66, ECJ

Horcal v Gatland [1984] BCLC 549, CA. **Distinguished,** *Item Software (UK) Ltd v Fassihi* [2005] ICR 450, CA

Horkulak v Cantor Fitzgerald International [2004] ICR 697. **Decision of Newman J varied** [2005] ICR 402, CA

Horrocks v Lowe [1975] AC 135, 150; [1974] 2 WLR 282; [1974] 1 All ER 662, HL(E). **Dicta of Lord Diplock applied,** *Street v Derbyshire Unemployed Workers' Centre* [2005] ICR 97, CA

Horton v Tamplin Contracts Ltd [2003] ICR 179, CA. **Applied,** *Robb v Salamis (M & I) Ltd* [2007] ICR 175, HL(Sc)

Huddersfield Fine Worsteds Ltd, In re [2005] EWHC 1682 (Ch). **Decision of Peter Smith J** sub nom *Krasner v McMath* **reversed** [2006] ICR 205, CA

Humphreys v University of Oxford [2000] ICR 405; [2000] 1 All ER 996, CA. **Considered,** *Rossiter v Pendragon plc* [2002] ICR 1063, CA

Hunter v Butler [1996] RTR 396, CA. **Applied,** *Hewison v Meridian Shipping Services PTE Ltd* [2003] ICR 766, CA

Hurditch v Sheffield Health Authority [1989] QB 562; [1989] 2 WLR 827; [1989] 2 All ER 869, CA. **Followed,** *Fairchild v Glenhaven Funeral Services Ltd* [2002] ICR 412, CA

Igen Ltd (formerly Leeds Careers Guidance) v Wong [2005] ICR 931; [2005] 1 All ER 812, CA. **Applied,** *Madarassy v Nomura International plc* [2007] ICR 867, CA. **Considered,** *Laing v Manchester City Council* [2006] ICR 1519, EAT; *Villalba v Merrill Lynch & Co Inc* [2007] ICR 469, EAT; *Bolton School v Evans* [2007] ICR 641, CA

Immigration Advisory Service v Oommen [1997] ICR 683, EAT. **Followed,** *Scotford v SmithKline Beecham* [2002] ICR 264, EAT. **Disapproved,** *Gdynia America Shipping Lines (London) Ltd v Chelminski* [2004] ICR 1523, CA

India (Republic of) v India Steamship Co Ltd [1993] AC 410, 417; [1993] 2 WLR 461; [1993] 1 All ER 998, HL(E). **Dictum of Lord Goff of Chieveley applied,** *Fraser v HLMAD Ltd* [2006] ICR 1395, CA

Ingram v Foxon [1984] ICR 685, EAT. **Followed,** *London Probation Board v Kirkpatrick* [2005] ICR 965, EAT

Inland Revenue Comrs v Bebb Travel [2003] ICR 201, EAT. **Decision of the Employment Appeal Tribunal affirmed** [2003] ICR 1271, CA

Inland Revenue Comrs v Plummer [1980] AC 896; [1979] 3 WLR 689; [1979] 3 All ER 775, HL(E). **Applied,** *Jones v Garnett* [2006] ICR 690, CA; [2007] ICR 1259, HL(E)

Inland Revenue Comrs v Scottish & Newcastle Breweries Ltd [1982] 1 WLR 322, 327; [1982] 2 All ER 230, HL(Sc). **Dicta of Lord Lowry applied,** *Clark v Perks (No 2)* [2002] ICR 302, CA

Investors Compensation Scheme Ltd v West Bromwich Building Society [1998] 1 WLR 896, 912–913; [1998] 1 All ER 98, HL(E). **Dicta of Lord Hoffmann applied,** *Bank of Credit and Commerce International SA v Ali* [2001] ICR 337, HL(E)

Irvine v Comr of Police of the Metropolis [2005] EWCA Civ 129, CA. **Considered,** *Moon v Garrett* [2007] ICR 95, CA

Item Software (UK) Ltd v Fassihi [2003] 2 BCLC 1. **Decision of Nicholas Strauss QC sitting as a deputy judge of the High Court allowed in part** [2005] ICR 450, CA

Jackson v Chief Adjudication Officer (Cases C-63 and 64/91) [1993] QB 367; [1993] 2 WLR 658; [1993] 3 All ER 265; [1992] ECR I-4737, ECJ. **Considered,** *Hockenjos v Secretary of State for Social Security* [2001] ICR 966, CA

Jacobi v Griffiths (1999) 174 DLR (4th) 71. **Applied,** *Lister v Hesley Hall Ltd* [2001] ICR 665, HL(E)

James v Greenwich London Borough Council [2007] ICR 577, EAT. **Considered,** *Croke v Hydro Aluminium Worcester Ltd* [2007] ICR 1303, EAT

Jameson v Lovis [2001] EWCA Civ 1264, CA. **Applied,** *Goldman Sachs Services Ltd v Montali* [2002] ICR 1251, EAT

Jayes v IMI (Kynoch) Ltd [1985] ICR 155, CA. **Not followed,** *Anderson v Newham College of Further Education* [2003] ICR 212, CA

Jeetle v Elster [1985] ICR 389, 400, EAT. **Dicta of Beldam J approved,** *Bower v Stevens* [2004] ICR 1582, CA

Jenkins v Kingsgate (Clothing Productions) Ltd (Case 96/80) [1981] ICR 592; [1981] 1 WLR 972; [1981] ECR 911, ECJ. **Considered,** *Parliamentary Comr for Administration and the Health Service Comrs v Fernandez* [2004] ICR 123, EAT

Johnson v Gore-Wood & Co [2002] 2 AC 1; [2001] 2 WLR 72; [2001] 1 All ER 481, HL(E). **Applied,** *Chaudhary v Royal College of Surgeons* [2003] ICR 1510, CA; *R (Foster) v Eastbourne Borough Council* [2004] ICR 1149, CA

Johnson v Ryan [2000] ICR 236, EAT. **Considered,** *Lincolnshire County Council v Hopper* [2002] ICR 1301, EAT

Johnson v Unisys Ltd [1999] ICR 809, CA. **Decision of the Court of Appeal affirmed** [2001] ICR 480, HL(E)

Johnson v Unisys Ltd [2001] ICR 480, 500, para 55; [2003] 1 AC 518; [2001] 2 WLR 1076; [2001] 2 All ER 801, HL(E). **Applied,** *Horkulak v Cantor Fitzgerald International* [2004] ICR 697. **Considered,** *McCabe v Cornwall County Council* [2003] ICR 501, CA; *GAB Robins (UK) Ltd v Triggs* [2007] ICR 1424, EAT. **Dicta of Lord Hoffmann considered,** *Dunnachie v Kingston upon Hull City Council* [2004] ICR 481, CA. **Explained,** *Dunnachie v Kingston upon Hull City Council* [2003] ICR 1294, EAT. **Distinguished,** *Eastwood v Magnox Electric plc* [2004] ICR 1064, HL(E). **Dicta of Lord Hoffmann not applied,** *Dunnachie v Kingston upon Hull City Council* [2004] ICR 1052, HL(E)

Johnston v Chief Constable of the Royal Ulster Constabulary (Case 222/84) [1987] ICR 83; [1987] QB 129; [1986] 3 WLR 1038; [1986] 3 All ER 135; [1980] ECR 1651, ECJ. **Applied,** *Chief Constable of the West Yorkshire Police v A* [2001] ICR 128, EAT

Jones v Garnett [2005] STC 1667. **Decision of Park J reversed** [2006] ICR 690, CA

Jones v Garnett [2006] ICR 690; [2006] 1 WLR 1123; [2006] 2 All ER 381, CA. **Decision of the Court of Appeal affirmed on different grounds** [2007] ICR 1259, HL(E)

Jones v Governing Body of Burdett Coutts School [1999] ICR 38, CA. **Considered,** *Comr of Police of the Metropolis v Hendricks* [2003] ICR 530, CA

Jones v Mid-Glamorgan County Council [1997] ICR 815, 826, CA. **Dicta of Waite LJ applied,** *Logan v Customs and Excise Comrs* [2004] ICR 1, CA

Jones v 3M Healthcare Ltd [2002] ICR 341, EAT. **Decision of the Employment Appeal Tribunal affirmed** [2002] ICR 1124, CA

Jones v 3M Healthcare Ltd [2002] ICR 1124, CA. **Decision of the Court of Appeal reversed** [2003] ICR 867, HL(E)

Joseph v Heath Ltd (unreported) 11 February 1998, EAT. **Considered,** *London Probation Board v Kirkpatrick* [2005] ICR 965, EAT

Jowitt v Pioneer Technology (UK) Ltd [2002] IRLR 790, EAT. **Decision of the Employment Appeal Tribunal reversed** [2003] ICR 1120, CA

KB v National Health Service Pensions Agency (Case C-117/01) [2004] ICR 781; [2004] All ER (EC) 1089; [2004] ECR I-541, ECJ. **Considered,** *Richards v Secretary of State for Work and Pensions* (Case C-423/04) [2006] ICR 1181, ECJ

Kalanke v Freie Hansestadt Bremen (Case C-450/93) [1996] ICR 314; [1996] All ER (EC) 66; [1995] ECR I-3051, ECJ. **Considered,** *Marschall v Land Nordrhein-Westfalen* (Case C-409/95) [2001] ICR 45, ECJ

Kaur v MG Rover Group Ltd [2004] IRLR 279. **Decision of Judge Alton sitting as a judge of the High Court reversed in part** [2005] ICR 625, CA

Keen v Commerzbank AG [2006] EWHC 785 (Comm). **Decision of Morison J reversed** [2007] ICR 623, CA

Kelly v First Engineering Ltd 1999 SCLR 1025, Ct of Sess. **Considered,** *Hammond v Comr of Police of the Metropolis* [2004] ICR 1467, CA

Kelly v Liverpool Maritime Terminals Ltd [1988] IRLR 310, CA. **Explained,** *Halfpenny v IGE Systems Ltd* [2001] ICR 73, HL(E)

Kelly v Northern Ireland Housing Executive [1998] ICR 828; [1999] 1 AC 428; [1998] 3 WLR 735, HL(NI). **Distinguished,** *Patterson v Legal Services Commission* [2004] ICR 312, EAT and CA

Kenny v Hampshire Constabulary [1999] ICR 27, EAT. **Considered,** *Edwards v Mid-Suffolk District Council* [2001] ICR 616, CA

Kerry Foods Ltd v Creber [2000] ICR 556, EAT. **Followed,** *Alamo Group (Europe) Ltd v Tucker* [2003] ICR 829, EAT. **Distinguished,** *Transport & General Workers' Union v McKinnon, J R Haulage Ltd* [2001] ICR 1281, EAT(Sc)

Khan v General Medical Council [1996] ICR 1032, 1043–1044, CA. **Applied,** *Chaudhary v Specialist Training Authority Appeal Panel (No 2)* [2005] ICR 1086, CA. **Dicta of Hoffmann LJ applied,** *Chaudhary v Royal College of Surgeons* [2003] ICR 1510, CA

Khan v Heywood & Middleton Primary Care Trust [2006] ICR 543, EAT. **Decision of the Employment Appeal Tribunal affirmed** [2007] ICR 24, CA

Kigass Aero Components Ltd v Brown [2002] ICR 697, 700, 702, paras 8, 12, EAT. **Dicta of Lindsay J explained,** *Canada Life Ltd v Gray* [2004] ICR 673, EAT. **Overruled,** *Inland Revenue Comrs v Ainsworth* [2005] ICR 1149, CA

King v Eaton Ltd (No 2) [1998] IRLR 686, Ct of Sess. **Followed,** *Lambe v 186K Ltd* [2005] ICR 307, CA

King v Great Britain-China Centre [1992] ICR 516, 529, CA. **Applied,** *Anya v University of Oxford* [2001] ICR 847, CA. **Dicta of Neill LJ applied,** *Rowden v Dutton Gregory* [2002] ICR 971, EAT. **Considered,** *Igen Ltd (formerly Leeds Careers Guidance) v Wong* [2005] ICR 931, CA

King v T Tunnock Ltd [2000] Eu LR 531; 2000 SC 424. **Considered,** *Lonsdale (trading as Lonsdale Agencies) v Howard & Hallam Ltd* [2006] ICR 584, CA. **Doubted,** *Lonsdale (trading as Lonsdale Agencies) v Howard & Hallam Ltd (Winemakers' Federation of Australia Inc intervening)* [2007] ICR 1338, HL(E)

Kirby v Manpower Services Commission [1980] ICR 420; [1980] 1 WLR 725; [1980] 3 All ER 334, EAT. **Not applied,** *Chief Constable of the West Yorkshire Police v Khan* [2001] ICR 1065, HL(E)

Kirkham v Chief Constable of the Greater Manchester Police [1990] 2 QB 283; [1990] 2 WLR 987; [1990] 3 All ER 246, CA. **Considered,** *Corr v IBC Vehicles Ltd* [2006] ICR 1138, CA

Kirton v Tetrosyl Ltd [2003] ICR 37, EAT. **Decision of the Employment Appeal Tribunal reversed** [2003] ICR 1237, CA

Knulty v Eloc Electro-Optiek and Communicatie BV [1979] ICR 827. **Disapproved,** *Zietsman (trading as Berkshire Orthodontics) v Stubbington* [2002] ICR 249, EAT

Koonjul v Thameslink Healthcare Services [2000] PIQR P123, CA. **Considered,** *O'Neill v DSG Retail Ltd* [2003] ICR 222, CA

Kossinski v Chrysler United Kingdom Ltd (1973) 15 KIR 225, CA. **Distinguished,** *Coxall v Goodyear Great Britain Ltd* [2003] ICR 152, CA

Kramer v South Bedfordshire Community Health Care Trust [1995] ICR 1066. **Considered,** *Skidmore v Dartford & Gravesham NHS Trust* [2001] ICR 911, EAT. **Disapproved,** *Saeed v Royal Wolverhampton Hospitals NHS Trust* [2001] ICR 903, CA; [2003] ICR 721, CA

Krasner v Dennison [2001] Ch 76; [2000] 3 WLR 720; [2000] 3 All ER 322, CA. **Applied,** *In re Malcolm* [2005] ICR 611, CA

Krasner v McMath [2006] ICR 205; [2005] 4 All ER 886, CA. **Applied,** *In re Leeds United Association Football Club Ltd* [2007] ICR 1688

Kraus v Penna plc [2004] IRLR 260, para 29, EAT. **Disapproved,** *Babula v Waltham Forest College* [2007] ICR 1026, CA

Kudrath v Ministry of Defence (unreported) 26 April 1999, EAT. **Approved,** *Stansbury v Datapulse plc* [2004] ICR 523, CA

Kuttapan v Croydon London Borough Council [1999] IRLR 349, EAT. **Followed,** *Maurice v Betterware UK Ltd* [2001] ICR 14, EAT. **Considered,** *Sodexho Ltd v Gibbons* [2005] ICR 1647, EAT

Kuwait Airways Corpn v Iraqi Airways Co (Nos 4 and 5) [2002] 2 AC 883, 1091; [2002] 2 WLR 1353; [2002] 3 All ER 209, HL(E). **Dicta of Lord Nicholls of Birkenhead applied,** *Essa v Laing Ltd* [2004] ICR 746, CA

Kwamin v Abbey National plc [2004] ICR 841, EAT. **Followed,** *Yearwood v Comr of Police of the Metropolis* [2004] ICR 1660, EAT. **Considered,** *Connex South Eastern Ltd v Bangs* [2005] ICR 763, CA

Kwik Save Stores Ltd v Greaves [1998] ICR 848, CA. **Overruled,** *Halfpenny v IGE Systems Ltd* [2001] ICR 73, HL(E)

Kwik Save Stores Ltd v Swain [1997] ICR 49, EAT. **Considered,** *Pendragon plc (trading as C D Bramall Bradford) v Copus* [2005] ICR 1671, EAT

LIFFE Administration and Management v Pinkava [2006] EWHC 595 (Pat). **Decision of Kitchin J affirmed on partly different grounds** [2007] ICR 1489, CA

Laing v Manchester City Council [2006] ICR 1519, EAT. **Approved,** *Madarassy v Nomura International plc* [2007] ICR 867, CA

Lake v British Transport Police [2007] ICR 47, EAT. **Decision of the Employment Appeal Tribunal reversed** [2007] ICR 1293, CA

Lambe v 186K Ltd [2005] ICR 307, CA. **Applied,** *Gover v Propertycare Ltd* [2006] ICR 1073, CA

Lambert v Croydon College [1999] ICR 409, EAT. **Overruled,** *Fitzgerald v University of Kent at Canterbury* [2004] ICR 737, CA

Land Brandenburg v Sass (Case C-284/02) [2004] ECR I-11143, ECJ. **Applied,** *R (Equal Opportunities) v Secretary of State for Trade and Industry* [2007] ICR 1234, CA

Landeshauptstadt Kiel v Jaeger (Case C-151/02) [2004] ICR 1528; [2003] ECR I-8389; [2004] All ER (EC) 604, ECJ. **Applied,** *MacCartney v Oversley House Management* [2006] ICR 510, EAT

Langley v Burlo [2006] ICR 850, EAT. **Decision of the Court of Appeal affirmed** [2007] ICR 390, CA

Latchman v Reed Business Information Ltd [2002] ICR 1453, EAT. **Not followed,** *McDougall v Richmond Adult Community College* [2007] ICR 1567, EAT

Lavarack v Woods of Colchester Ltd [1967] 1 QB 278; [1966] 3 WLR 706; [1966] 3 All ER 683, CA. **Distinguished,** *Horkulak v Cantor Fitzgerald International* [2005] ICR 402, CA

Lawal v Northern Spirit Ltd [2002] ICR 486, EAT. **Decision of the Employment Appeal Tribunal affirmed** [2002] ICR 1507, CA

Lawal v Northern Spirit Ltd [2002] ICR 1507, CA. **Decision of the Court of Appeal reversed** [2003] ICR 856, HL(E)

Lawrence v Regent Office Care Ltd [1999] ICR 654, EAT. **Considered,** *South Ayrshire Council v Morton* [2002] ICR 956, Ct of Sess

Lawrence v Regent Office Care Ltd (Case C-320/00) [2003] ICR 1092; [2002] ECR I-7325, ECJ. **Applied,** *Allonby v Accrington and Rossendale College* (Case C-256/01) [2004] ICR 1328, ECJ; *Department for Environment Food and Rural Affairs v Robertson* [2005] ICR 750, CA. **Considered,** *Department for Environment Food and Rural Affairs v Robertson* [2004] ICR 1289, EAT

Lawson v Serco Ltd [2004] ICR 204, CA. **Decision of the Court of Appeal reversed** [2006] ICR 250, HL(E)

Lawson v Serco Ltd [2004] ICR 204; [2004] 2 All ER 200, CA. **Applied,** *Shekar v Satyam Computer Services Ltd* [2005] ICR 737, Employment Tribunal; *Crofts v Cathay Pacific Airways Ltd* [2005] ICR 1436, CA

Leighton v Michael [1995] ICR 1091, EAT. **Followed,** *Governing Body of Addey and Stanhope School v Vakante* [2003] ICR 290, EAT. **Approved,** *Hall v Woolston Hall Leisure Ltd* [2001] ICR 99, CA. **Distinguished,** *Vakante v Governing Body of Addey and Stanhope School (No 2)* [2004] ICR 279, EAT

Lennon v Birmingham City Council [2001] IRLR 826, CA. **Distinguished,** *Ako v Rothschild Asset Management Ltd* [2002] ICR 899, CA

Les Ambassadeurs Club v Bainda [1982] IRLR 5, EAT. **Disapproved,** *Bentwood Bros (Manchester) Ltd v Shepherd* [2003] ICR 1000, CA

Leverton v Clwyd County Council [1989] ICR 33; [1989] AC 706; [1989] 2 WLR 47; [1989] 1 All ER 78, HL(E). **Applied,** *South Tyneside Metropolitan Council v Anderson* [2007] ICR 1581, CA

Levez v T H Jennings (Harlow Pools) Ltd (Case C-326/96) [1999] ICR 521; [1998] ECR I-7835, ECJ. **Applied,** *Preston v Wolverhampton Healthcare NHS Trust (No 2)* [2001] ICR 217, HL(E)

Levin v Staatssecretaris van Justitie (Case 53/81) [1982] ECR 1035, ECJ. **Applied,** *R (Payir) v Secretary of State for the Home Department* [2006] ICR 188

Lewen v Denda (Case C-333/97) [2000] ICR 648; [1999] ECR I-7243, ECJ. **Applied,** *R (Equal Opportunities Commission) v Secretary of State for Trade and Industry* [2007] ICR 1234, CA

Lewis v Motorworld Garages Ltd [1986] ICR 157, CA. **Followed,** *Meikle v Nottinghamshire County Council* [2005] ICR 1, CA. **Considered,** *Logan v Customs and Excise Comrs* [2004] ICR 1, CA

Lindsay v Ironsides Ray & Vials [1994] ICR 384, EAT. **Considered,** *Stanley Cole (Wainfleet) Ltd v Sheridan* [2003] ICR 1449, CA

Liskojarvi v Oy Liikenne Ab (Case C-172/99) [2002] ICR 155; [2001] ECR I-745, ECJ. **Distinguished,** *NUMAST v P & O Scottish Ferries Ltd* [2005] ICR 1270, EAT(Sc)

List Design Group Ltd v Douglas [2002] ICR 686, EAT. **Followed,** *Canada Life Ltd v Gray* [2004] ICR 673, EAT

Lister v Hesley Hall Ltd [2001] ICR 665; [2002] 1 AC 215; [2001] 2 WLR 1311; [2001] 2 All ER 769, HL(E). **Applied,** *Mattis v Pollock (trading as Flamingos Nightclub)* [2003] ICR 1335, CA; *Majrowski v Guy's and St Thomas's NHS Trust* [2005] ICR 977, CA

Locabail (UK) Ltd v Bayfield Properties Ltd [2000] QB 451; [2000] 2 WLR 870; [2000] 1 All ER 65, CA. **Applied,** *Facey v Midas Retail Security Ltd* [2001] ICR 287, EAT; *Ansar v Lloyds TSB Bank plc* [2006] ICR 1565, EAT

Lodwick v Southwark London Borough Council [2004] ICR 884, CA. **Applied,** *Ansar v Lloyds TSB Bank plc* [2006] ICR 1565, EAT

L'Office Cherifien des Phosphates v Yamashita-Shinnihon Steamship Co Ltd [1994] 1 AC 486; [1994] 2 WLR 39; [1994] 1 All ER 20, HL(E). **Applied,** *Meteorological Office v Edgar* [2002] ICR 149, EAT

London Clubs Management Ltd v Hood [2001] IRLR 719, EAT. **Explained,** *O'Hanlon v Revenue and Customs Comrs* [2006] ICR 1579, EAT

London Underground Ltd v National Union of Rail, Maritime & Transport Workers [2001] ICR 647, CA. **Distinguished,** *Westminster City Council v UNISON* [2001] ICR 1046, CA

London Underground Ltd v National Union of Railwaymen, Maritime & Transport Staff [1996] ICR 170, 178, CA. **Dicta of Millett LJ applied,** *P (A Minor) v National Association of School Masters/Union of Women Teachers* [2001] ICR 1241, CA. **Considered,** *P (A Minor) v National Association of School Masters/Union of Women Teachers* [2003] ICR 386, HL(E)

Lonsdale (trading as Lonsdale Agencies) v Howard & Hallam Ltd [2006] ICR 584; [2006] 1 WLR 1281, CA. **Decision of the Court of Appeal affirmed** [2007] ICR 1338, HL(E)

Lord Chancellor v Coker [2001] ICR 507, EAT. **Decision of the Employment Appeal Tribunal affirmed** [2002] ICR 321, CA

Lord Chancellor v Coker [2001] ICR 507, EAT. **Not applied,** *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337, HL(NI)

Lucas (T) & Co Ltd v Mitchell [1974] Ch 129, 135; [1972] 3 WLR 934; [1972] 3 All ER 689, CA. **Dicta of Russell LJ explained,** *Beckett Investment Management Group Ltd v Hall* [2007] ICR 1539, CA

Lunt v Merseyside TEC Ltd [1999] ICR 17, EAT. **Considered,** *University of East London v Hinton* [2005] ICR 1260, CA

MHC Consulting Services Ltd v Tansell [2000] ICR 789, CA. **Considered,** *Croke v Hydro Aluminium Worcester Ltd* [2007] ICR 1303, EAT

MPB Structures Ltd v Munro [2002] IRLR 601, EAT(Sc). **Decision of the Employment Appeal Tribunal (Scotland) affirmed** [2004] ICR 430, Ct of Sess

MPB Structures Ltd v Munro [2004] ICR 430, Ct of Sess. **Not followed,** *Marshalls Clay Products Ltd v Caulfield* [2004] ICR 436, EAT. **Not approved,** *Marshalls Clay Products Ltd v Caulfield* [2004] ICR 1502, CA

McCabe v Cornwall County Council [2003] ICR 501, CA. **Decision of the Court of Appeal affirmed** [2004] ICR 1064, HL(E)

MacCulloch & Wallis Ltd v Moore (unreported) 11 February 2003, EAT. **Considered,** *Forster v Cartwright Black* [2004] ICR 1728, EAT

Macdonald v Ministry of Defence [2001] ICR 1, EAT (Sc). **Decision of the Employment Appeal Tribunal (Scotland) reversed** [2002] ICR 174, Ct of Sess

Macdonald v Ministry of Defence [2002] ICR 174, Ct of Sess. **Decision of the Court of Session affirmed** [2003] ICR 937, HL(Sc)

Macdonald v Ministry of Defence [2002] ICR 174, Ct of Sess. **Applied,** *Pearce v Governing Body of Mayfield Secondary School* [2002] ICR 198, CA

McGhee v National Coal Board [1973] 1 WLR 1; [1972] 3 All ER 1008, HL(Sc). **Applied,** *Barker v Corus UK Ltd* [2006] ICR 809, HL(E). **Distinguished,** *Fairchild v Glenhaven Funeral Services Ltd* [2002] ICR 412, CA

Mackie v John Holt Vintners Ltd (Note) [1982] ICR 146, EAT. **Distinguished,** *Maurice v Betterware UK Ltd* [2001] ICR 14, EAT

McMeechan v Secretary of State for Employment [1997] ICR 549, CA. **Considered,** *Montgomery v Johnson Underwood Ltd* [2001] ICR 819, CA

McNicol v Balfour Beatty Rail Maintenance Ltd [2002] ICR 381, EAT. **Decision of the Employment Appeal Tribunal affirmed** [2002] ICR 1498, CA

McNicol v Balfour Beatty Rail Maintenance Ltd [2002] ICR 1498, CA. **Considered,** *Dunham v Ashford Windows Ltd* [2005] ICR 1584, EAT

McPherson v BNP Paribas (London Branch) [2004] ICR 1398, CA. **Applied,** *Salinas v Bear Stearns International Holdings Inc* [2005] ICR 1117, EAT

Magorrian v Eastern Health and Social Services Board (Case C-246/98) [1998] ICR 979; [1997] ECR I-7153, ECJ. **Applied,** *Preston v Wolverhampton Healthcare NHS Trust (No 2)* [2001] ICR 217, HL(E). **Distinguished,** *Quirk v Burton Hospitals NHS Trust* [2001] ICR 415, EAT; [2002] ICR 602, CA

Mahmud v Bank of Credit and Commerce International SA [1997] ICR 606, 609, 621; [1998] AC 20; [1997] 3 WLR 95; [1997] 3 All ER 1, HL(E). **Applied,** *Bank of Credit and SA v Ali (No 2) Commerce International* [2002] ICR 1258, CA; *Horkulak v Cantor Fitzgerald International* [2004] ICR 697. **Dicta applied,** *Transco plc v O'Brien* [2002] ICR 721, CA. **Considered,** *Baldwin v Brighton and Hove City Council* [2007] ICR 680, EAT. **Distinguished,** *Johnson v Unisys Ltd* [2001] ICR 480, HL(E)

Majrowski v Guy's and St Thomas's NHS Trust [2005] ICR 977; [2005] QB 848; [2005] 2 WLR 1503, CA. **Decision of the Court of Appeal affirmed** [2006] ICR 1199, HL(E)

Makepiece v Evans Bros (Reading) [2001] ICR 241, 244, para 7, CA. **Considered,** *Gray v Fire Alarm Fabrication Services Ltd* [2007] ICR 247, CA. **Observation of Mantell LJ considered,** *Fairchild v Glenhaven Funeral Services Ltd* [2002] ICR 412, CA

Malcolm, In re [2004] 1 WLR 1803. **Decision of Lloyd J affirmed** [2005] ICR 611, CA

Marinovich v General Medical Council [2002] UKPC 36, PC. **Applied,** *Raschid v General Medical Council* [2007] ICR 811, CA

Marks & Spencer plc v Palmer [2001] EWCA Civ 1528, CA. **Considered,** *Ellis v Bristol City Council* [2007] ICR 1614, CA

Marleasing SA v La Comercial Internacional de Alimentación (Case C-106/96) [1990] ECR I-4135, ECJ. **Applied,** *Pfeiffer v Deutsches Rotes Kreuz, Kreisverband Waldshut eV* (Cases C-397–403/01) [2005] ICR 1307, ECJ

Marshall v Southampton and South West Hampshire Area Health Authority (Teaching) (Case 152/84) [1986] ICR 335, 355, para 48; [1986] QB 401; [1986] 2 WLR 780; [1986] 2 All ER 584; [1986] ECR 723, ECJ. **Dicta applied,** *Pfeiffer v Deutsches Rotes Kreuz, Kreisverband Waldshut eV* (Cases C-397–403/01) [2005] ICR 1307, ECJ

Marshalls Clay Products Ltd v Caulfield [2004] ICR 436, para 37(ii), EAT. **Guidelines amended,** *Smith v A J Morrisroes & Sons Ltd* [2005] ICR 596, EAT

Martinez Sala v Freistaat Bayern (Case C-85/96) [1998] ECR I-2691, 2726, para 63, ECJ. **Dicta applied,** *Grzelczyk v Centre public d'aide sociale Ottignies-Louvain-la-Neuve* (Case C-184/99) [2002] ICR 566, ECJ

Mason v Governing Body of Ward End Primary School [2006] ICR 1128, EAT. **Not followed,** *Kelly-Madden v Manor Surgery* [2007] ICR 203, EAT

Masterfoods Ltd v HB Ice Cream Ltd (Case C-344/98) [2000] ECR I-11369, ECJ. **Considered,** *Crehan v Inntrepreneur Pub Co (CPC) (Office of Fair Trading intervening)* [2006] ICR 1344, HL(E)

Matthews v Kent and Medway Towns Fire Authority [2004] ICR 257, EAT. **Decision of the Employment Appeal Tribunal affirmed in part** [2005] ICR 84, CA

Matthews v Kent and Medway Towns Fire Authority [2005] ICR 84, CA. **Decision of the Court of Appeal reversed** [2006] ICR 365, HL(E)

Matthews v Ministry of Defence [2002] EWHC 13 (QB). **Decision of Keith J reversed** [2002] ICR 1003, CA

Matthews v Ministry of Defence [2002] ICR 1003; [2002] 1 WLR 2621; [2002] 3 All ER 513, CA. **Decision of the Court of Appeal affirmed** [2003] ICR 247, HL(E)

Maund v Penwith District Council [1984] ICR 143, CA. **Considered,** *Kuzel v Roche Products Ltd* [2007] ICR 945, EAT

Maurice v Betterware UK Ltd [2001] ICR 14, EAT. **Considered,** *Sodexho Ltd v Gibbons* [2005] ICR 1647, EAT

Meadow v General Medical Council [2006] 1 WLR 1452; [2006] 2 All ER 329. **Decision of Collins J reversed in part** [2007] ICR 701, CA

Meek v City of Birmingham District Council [1987] IRLR 250, CA. **Followed,** *Lambe v 186K Ltd* [2005] ICR 307, CA

Meikle v Nottinghamshire County Council [2005] ICR 1; [2004] 4 All ER 97, CA. **Considered,** *O'Hanlon v Revenue and Customs Comrs* [2006] ICR 1579, EAT

Melia v Magna Kansei Ltd [2005] ICR 874, EAT. **Decision of the Employment Appeal Tribunal reversed in part** [2006] ICR 410, CA

Merckx v Ford Motors Co (Belgium) SA (Cases C-171 and 172/94) [1997] ICR 352; [1996] ECR I-1253, ECJ. **Considered,** *Rossiter v Pendragon plc* [2002] ICR 1063, CA

Mercury Communications Ltd v Scott-Garner [1984] ICR 74, CA. **Considered,** *Westminster City Council v UNISON* [2001] ICR 1046, CA

Mersey Docks and Harbour Board v Coggins & Griffith (Liverpool) Ltd [1947] AC 1; [1946] 2 All ER 345, HL(E). **Explained,** *Viasystems (Tyneside) Ltd v Thermal Transfer (Northern) Ltd* [2006] ICR 327, CA

Methodist Conference (President of the) v Parfitt [1984] ICR 176; [1984] QB 368; [1984] 2 WLR 84; [1983] 3 All ER 747, CA. **Considered,** *Percy v Board of National Mission of the Church of Scotland* [2006] ICR 134, HL(Sc)

Metropolitan Police Service v Shoebridge [2004] ICR 1690, EAT. **Considered,** *Baynton v South West Trains Ltd* [2005] ICR 1730, EAT

Midland Mainline v Wade (unreported) 4 November 2002, EAT. **Approved,** *Parry v National Westminster Bank plc* [2005] ICR 396, CA

Migwain Ltd v Transport and General Workers' Union [1979] ICR 597, 601, EAT. **Dicta of Slynn J followed,** *Zietsman (trading as Berkshire Orthodontics) v Stubbington* [2002] ICR 249, EAT

Miles v Gilbank [2006] ICR 12, EAT. **Decision of the Employment Appeal Tribunal affirmed** [2006] ICR 1297, CA

Miles v Wakefield Metropolitan District Council [1985] ICR 363; [1985] 1 WLR 822; [1985] 1 All ER 905, CA. **Applied,** *Lincolnshire County Council v Hopper* [2002] ICR 1301, EAT

Miles v Wakefield Metropolitan District Council [1987] ICR 368; [1987] AC 539; [1987] 2 WLR 795; [1987] 1 All ER 1089, HL(E). **Distinguished,** *Item Software (UK) Ltd v Fassihi* [2005] ICR 450, CA

Mills v Inland Revenue Comrs [1975] AC 38; [1974] 2 WLR 325; [1974] 1 All ER 722; [1974] STC 130, HL(E). **Distinguished,** *Jones v Garnett* [2006] ICR 690, CA

Ministry of Defence v Jeremiah [1980] ICR 13, 31; [1980] QB 87; [1979] 3 WLR 857; [1979] 3 All ER 833, CA. **Dictum of Brightman LJ applied,** *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337, HL(NI); *Derbyshire v St Helens Metropolitan Borough Council (Equal Opportunities Commission intervening)* [2007] ICR 841, HL(E)

Mirror Group Newspapers Ltd v Gunning [1986] ICR 145; [1986] 1 WLR 546; [1986] 1 All ER 385, CA. **Applied,** *Patterson v Legal Services Commission* [2004] ICR 312, EAT and CA

Mitchell v North British Rubber Co Ltd 1945 JC 69. **Applied,** *Robb v Salamis (M & I) Ltd* [2007] ICR 175, HL(Sc)

Mock v Inland Revenue Comrs [1999] IRLR 785, EAT. **Followed,** *Sian v Abbey National plc* [2004] ICR 55, EAT. **Not followed,** *Scotford v SmithKline Beecham* [2002] ICR 264, CA

Morgan v Brith Gof Cyf [2001] ICR 978, EAT. **Considered,** *Gladwell v Secretary of State for Trade and Industry* [2007] ICR 264, EAT

Morgan v Electrolux Ltd [1991] ICR 369, CA. **Applied,** *Bennett v Southwark London Borough Council* [2002] ICR 881, CA

Morgan v Staffordshire University [2002] ICR 475, 483, para 20, EAT. **Dicta of Lindsay J approved,** *McNicol v Balfour Beatty Rail Maintenance Ltd* [2002] ICR 1498, CA. **Considered,** *Dunham v Ashford Windows Ltd* [2005] ICR 1584, EAT

Morgans v Alpha Plus Security Ltd [2005] ICR 525; [2005] 4 All ER 655, EAT. **Distinguished,** *Knapton v ECC Card Clothing Ltd* [2006] ICR 1084, EAT

Moriarty v Regent's Garage and Engineering Co Ltd [1921] 1 KB 423, DC. **Considered,** *Item Software (UK) Ltd v Fassihi* [2005] ICR 450, CA

Moroak (trading as Blake Envelopes) v Cromie [2005] ICR 1226, EAT. **Followed,** *Bone v Fabcon Projects Ltd* [2006] ICR 1421, EAT. **Considered,** *Pendragon plc (trading as C D Bramall Bradford) v Copus* [2005] ICR 1671, EAT

Morris v Secretary of State for Employment [1985] ICR 522, EAT. **Followed,** *Titchener v Secretary of State for Trade and Industry* [2002] ICR 225, EAT

Morris v Walsh Western UK Ltd [1997] IRLR 562, EAT. **Considered,** *London Probation Board v Kirkpatrick* [2005] ICR 965, EAT

Mulox IBC Ltd v Geels (Case C-125/92) [1993] ICR I-4075, ECJ. **Considered,** *Weber v Universal Ogden Services Ltd* (Case C-37/00) [2002] ICR 979, ECJ

Murphy v A Birrell & Sons Ltd [1978] IRLR 458, EAT (Sc). **Not followed,** *London Probation Board v Kirkpatrick* [2005] ICR 965, EAT

Murphy v Epsom College [1985] ICR 80, CA. **Considered,** *Shawkat v Nottingham City Hospital NHS Trust (No 2)* [2002] ICR 7, CA

Murphy v Slough Borough Council [2004] ICR 1163, EAT. **Decision of the Employment Appeal Tribunal affirmed** [2005] ICR 721, CA

Murray v British Shipbuilders (Hydrodynamics) Ltd [2004] EWCA Civ 948, CA. **Decision of the Court of appeal reversed** [2006] ICR 809, HL(E)

Murray v Foyle Meats Ltd [1999] ICR 827; [2000] 1 AC 51; [1999] 3 WLR 356; [1999] 3 All ER 769, HL(NI). **Applied,** *Shawkat v Nottingham City Hospital NHS Trust (No 2)* [2002] ICR 7, CA

Murray v Newham Citizens Advice Bureau Ltd (No 2) [2003] ICR 643, EAT. **Considered,** *Edmund Nuttall Ltd v Butterfield* [2006] ICR 77, EAT

NSM Music Ltd v Leefe [2006] ICR 450, para 7, EAT. **Dicta considered,** *D & H Travel Ltd v Foster* [2006] ICR 1537, EAT

Nagarajan v London Regional Transport [1998] IRLR 73, CA. **Not applied,** *Chief Constable of the West Yorkshire Police v Khan* [2001] ICR 1065, HL(E)

Nagarajan v London Regional Transport [1999] ICR 877, 887; [2000] 1 AC 501; [1999] 3 WLR 425; [1999] 4 All ER 65, HL(E). **Applied,** *Chamberlin v Emokpae* [2004] ICR 1476, EAT. **Dicta of Lord Nicholls of Birkenhead applied,** *Hussain v King's College Hospital NHS Trust* [2002] ICR 1433, CA. **Considered,** *Villalba v Merrill Lynch & Co Inc* [2007] ICR 469, EAT

National Coal Board v England [1954] AC 403; [1954] 2 WLR 400; [1954] 1 All ER 546, HL(E). **Considered,** *Majrowski v Guy's and St Thomas's NHS Trust* [2006] ICR 1199, HL(E)

National Coal Board v National Union of Mineworkers [1986] ICR 736, 773. **Dicta of Scott J approved,** *Kaur v MG Rover Group Ltd* [2005] ICR 625, CA

National Grid Co plc v Mayes [2000] ICR 174, CA. **Decision of the Court of Appeal reversed** [2001] ICR 544, HL(E)

National Justice Cia Naviera SA v Prudential Assurance Co Ltd (The Ikarian Reefer) [1993] 2 Lloyd's Rep 68, 80–82. **Dicta of Cresswell J applied,** *Meadow v General Medical Council* [2007] ICR 701, CA

Nelson v Carillion Services Ltd [2003] ICR 1256, para 26, CA. **Applied,** *Tyne and Wear Passenger Transport Executive (trading as Nexus) v Best* [2007] ICR 523, EAT. **Considered,** *Home Office v Bailey* [2005] ICR 1057, CA. **Dicta of Simon Brown LJ not followed,** *Igen Ltd (formerly Leeds Careers Guidance) v Wong* [2005] ICR 931, CA

Net Book Agreement 1957 (No 4), In re [1998] ICR 753, RP Ct. **Considered,** *In re Medicaments and Related Classes of Goods (No 3)* [2001] ICR 306, RP Ct

Nethermere (St Neots) Ltd v Gardiner [1984] ICR 612, CA. **Applied,** *Montgomery v Johnson Underwood Ltd* [2001] ICR 819, CA

Newham London Borough Council v Skingle [2002] ICR 1118. **Decision of Jacob J reversed** [2003] ICR 1008, CA

Newland v Simons & Willer (Hairdressers) Ltd [1981] ICR 521, EAT. **Doubted,** *Hall v Woolston Hall Leisure Ltd* [2001] ICR 99, CA

Nikitas v Solihull Metropolitan Borough Council [1986] ICR 291, EAT. **Followed,** *Maurice v Betterware UK Ltd* [2001] ICR 14, EAT

Nimz v Freie und Hansestadt Hamburg (Case C-184/89) [1991] ECR I-297; [1991] IRLR 222, ECJ. **Considered,** *Health and Safety Executive v Cadman* [2004] ICR 378, EAT

Normans Bay Ltd (formerly Illingworth Morris Ltd) v Coudert Bros [2004] EWCA Civ 215, The Times, 24 March 2004, CA. **Followed,** *Prison Service v Beart (No 2)* [2005] ICR 1206, CA

Norton Tool Co Ltd v Tewson [1972] ICR 501; [1973] 1 WLR 45; [1973] 1 All ER 183, NIRC. **Followed,** *Dunnachie v Kingston upon Hull City Council* [2003] ICR 1294, EAT; *Voith Turbo Ltd v Stowe* [2005] ICR 543, EAT. **Approved,** *Dunnachie v Kingston upon Hull City Council* [2004] ICR 1052, HL(E). **Considered,** *Langley v Burlo* [2007] ICR 390, CA. **Not followed,** *Langley v Burlo* [2006] ICR 850, EAT. **Overruled,** *Dunnachie v Kingston upon Hull City Council* [2004] ICR 481, CA

Oakley Inc v Animal Ltd (Secretary of State for Trade and Industry intervening) [2006] Ch 337; [2006] 2 WLR 294, CA. **Applied,** *Transport and General Workers' Union v Swissport (UK) Ltd* [2007] ICR 1593, EAT

O'Dea v ISC Chemicals Ltd [1966] ICR 222, CA. **Followed,** *Lambe v 186K Ltd* [2005] ICR 307, CA

O'Donoghue v Redcar and Cleveland Borough Council [2001] IRLR 615, CA. **Considered,** *Gover v Propertycare Ltd* [2006] ICR 1073, CA

Office Angels Ltd v Rainer-Thomas [1991] IRLR 214, CA. **Considered,** *Allan Janes LLP v Johal* [2006] ICR 742

O'Hanlon v Revenue and Customs Comrs [2006] ICR 1579, EAT. **Decision of the Employment Appeal Tribunal affirmed** [2007] ICR 1359, CA

O'Kelly v Trusthouse Forte plc [1983] ICR 728; [1984] QB 90; [1983] 3 WLR 605; [1983] 3 All ER 456, CA. **Applied,** *Bennett v Southwark London Borough Council* [2002] ICR 881, CA. **Distinguished,** *Cornwall County Council v Prater* [2006] ICR 731, CA

O'Neill v Symm & Co Ltd [1998] ICR 481, EAT. **Considered,** *Wright v Governing Body of Bilton High School* [2002] ICR 1463, EAT

Omar v Worldwide News Inc (trading as United Press International) [1998] IRLR 291, EAT. **Overruled,** *Kovacs v Queen Mary and Westfield College* [2002] ICR 919, CA

Omilaju v Waltham Forest London Borough Council [2005] ICR 481; [2005] 1 All ER 75, CA. **Considered,** *GAB Robins (UK) Ltd v Triggs* [2007] ICR 1424, EAT

Onwuka v Spherion Technology UK Ltd [2005] ICR 567, EAT. **Considered,** *Hart v English Heritage (Historic Buildings and Monuments Commission for England)* [2006] ICR 655, EAT

Ord v Upton [2000] Ch 352; [2000] 2 WLR 755; [2000] 1 All ER 193, CA. **Distinguished,** *Khan v Trident Safeguards Ltd* [2004] ICR 1591, CA

Outram v Academy Plastics Ltd [2001] ICR 367, CA. **Distinguished,** *Lennon v Comr of Police of the Metropolis* [2004] ICR 1114, CA

Overseas Union Insurance Ltd v New Hampshire Insurance Co (Case C-351/89) [1992] QB 434, 458–459; [1992] 2 WLR 586; [1992] 2 All ER 138; [1991] ECR I-3317, ECJ. **Dicta applied,** *Turner v Grovit* (Case C-159/02) [2005] ICR 23, ECJ

Oxford v Department of Health and Social Security [1977] ICR 884, EAT. **Applied,** *Logan v Customs and Excise Comrs* [2004] ICR 1, CA

P (A Minor) v National Association of School Masters/Union of Women Teachers [2001] ICR 1241, CA. **Decision of the Court of Appeal affirmed** [2003] ICR 386, HL(E)

P v S (Case C-13/94) [1996] ICR 795; [1996] ECR I-2143, ECJ. **Considered,** *Chief Constable of the West Yorkshire Police v A (No 2)* [2004] ICR 806, HL(E); *Richards v Secretary of State for Work and Pensions* (Case C-423/04) [2006] ICR 1181, ECJ. **Distinguished,** *Ashton v Chief Constable of West Mercia Constabulary* [2001] ICR 67, EAT

Padfield v Minister of Agriculture, Fisheries and Food [1968] AC 997; [1968] 2 WLR 924; [1968] 1 All ER 694, HL(E). **Applied,** *IBA Healthcare Ltd v Office of Fair Trading* [2004] ICR 1364, CA

Page v Smith [1996] AC 155; [1995] 2 WLR 644; [1995] 2 All ER 736, HL(E). **Applied,** *Simmons v British Steel plc* [2004] ICR 585, HL(Sc). **Considered,** *Corr v IBC Vehicles Ltd* [2006] ICR 1138, CA. **Distinguished,** *Rothwell v Chemical & Insulating Co Ltd* [2006] ICR 1458, CA

Page v Smith [1996] AC 155; [1995] 2 WLR 644; [1995] 2 All ER 736, HL(E). **Distinguished,** *Rothwell v Chemical & Insulating Co Ltd* [2007] ICR 1745, HL(E)

Palmer v Southend-on-Sea Borough Council [1984] ICR 372; [1984] 1 WLR 1129; [1984] 1 All ER 945, CA. **Applied,** *Marks & Spencer plc v Williams-Ryan* [2005] ICR 1293, CA

Parliamentary Comr for Administration and the Health Service Comrs v Fernandez [2004] ICR 123, EAT. **Followed,** *Villalba v Merrill Lynch & Co Inc* [2007] ICR 469, EAT. **Not followed,** *Sharp v Caledonia Group Services Ltd* [2006] ICR 218, EAT

Patel v Nagesan [1995] ICR 988, CA. **Distinguished,** *Wall v British Compressed Air Society* [2004] ICR 408, CA

Patterson v Legal Services Commission [2004] ICR 312, EAT. **Decision of the Employment Appeal Tribunal affirmed in part** [2004] ICR 312, CA

Patterson v Ministry of Defence [1987] CLY 1194. **Not approved,** *Rothwell v Chemical & Insulating Co Ltd* [2006] ICR 1458, CA

Patterson v Smiths Dock Ltd [2004] EWCA Civ 948, CA. **Decision of the Court of Appeal reversed** [2006] ICR 809, HL(E)

Pearce v Governing Body of Mayfield Secondary School [2000] ICR 920, EAT. **Decision of the Employment Appeal Tribunal affirmed** [2002] ICR 198, CA

Pearce v Governing Body of Mayfield Secondary School [2002] ICR 198, CA. **Decision of the Court of Appeal affirmed** [2003] ICR 937, HL(E)

Pearce v Governing Body of Mayfield Secondary School [2000] ICR 920, EAT. **Followed,** *Macdonald v Ministry of Defence* [2002] ICR 174, Ct of Sess. **Not followed,** *Macdonald v Ministry of Defence* [2001] ICR 1, EAT(Sc)

Pellegrin v France (1999) 31 EHRR 651. **Considered,** *Matthews v Ministry of Defence* [2002] ICR 1003, CA

Pepper v Hart [1993] ICR 291; [1993] AC 593; [1992] 3 WLR 1032; [1993] 1 All ER 42, HL(E). **Considered,** *Addison (trading as Brayton News) v Ashby* [2003] ICR 667, EAT

Percy v Board of National Mission of the Church of Scotland 2001 SC 757. **Interlocutor of the First Division of the Court of Session recalled** [2006] ICR 134, HL(Sc)

Perth and Kinross Council v Donaldso [2004] ICR 667, EAT (Sc). **Not followed,** *Transport and General Workers' Union v Swissport (UK) Ltd* [2007] ICR 1593. EAT

Pet Plan Ltd v Protect-A-Pet Ltd [1988] FSR 34, CA. **Applied,** *Goldman Sachs Services Ltd v Montali* [2002] ICR 1251, EAT

Pfeiffer v Deutsches Rotes Kreuz, Kreizerband Waldshut eV (Joined Cases C-397–403/01) [2005] ICR 1307; [2004] ECR I-8835, ECJ. **Considered,** *Attridge Law v Coleman* [2007] ICR 654, EAT

Pigney v Pointer's Transport Services Ltd [1957] 1 WLR 1121; [1957] 2 All ER 807. **Considered,** *Corr v IBC Vehicles Ltd* [2006] ICR 1138, CA

Pitts v Hunt [1991] 1 QB 24; [1990] 3 WLR 542; [1990] 3 All ER 344, CA. **Applied,** *Anderson v Newham College of Further Education* [2003] ICR 212, CA

Polkey v A E Dayton Services Ltd [1988] ICR 142; [1988] AC 344; [1987] 3 WLR 1153; [1987] 3 All ER 974, HL(E). **Applied,** *Whitbread plc (trading as Whitbread Medway Inns) v Hall* [2001] ICR 699, CA; *Alexander v Brigden Enterprises Ltd* [2006] ICR 1277, EAT. **Considered,** *Lambe v 186K Ltd* [2005] ICR 307, CA; *Gover v Propertycare Ltd* [2006] ICR 1073, CA

Porcelli v Strathclyde Regional Council [1986] ICR 564, Ct of Sess. **Applied,** *Macdonald v Ministry of Defence* [2001] ICR 1, EAT(Sc). **Considered,** *Macdonald v Ministry of Defence; Pearce v Governing Body of Mayfield Secondary School* [2003] ICR 937, HL(E & Sc)

Porter v Magill [2002] 2 AC 357, para 103; [2002] 3 WLR 437; [2002] 1 All ER 465, HL(E). **Applied,** *Lawal v Northern Spirit Ltd* [2002] ICR 1507, CA; [2003] ICR 856, HL(E); *Gillies v Secretary of State for Work and Pensions* [2006] ICR 267, HL(Sc). **Dicta of Lord Hope of Craighead applied,** *Ezsias v North Glamoran NHS Trust* [2007] ICR 1126, CA

Post Office v Adekeye [1997] ICR 110, CA. **Applied,** *Rhys-Harper v Relaxion Group plc* [2001] ICR 1176, CA; *Lawal v Northern Spirit Ltd* [2002] ICR 486, EAT. **Considered,** *Jones v 3M Healthcare Ltd* [2002] ICR 341, EAT. **Overruled,** *Rhys-Harper v Relaxion Group plc; D'Souza v Lambeth London Borough Council; Jones v 3M Healthcare Ltd* [2003] ICR 867, HL(E)

Post Office v Howell [2000] ICR 913, EAT. **Considered,** *Morgan v Brith Gof Cyf* [2001] ICR 978, CA; *Gladwell v Secretary of State for Trade and Industry* [2007] ICR 264, EAT

Post Office v Jones [2000] ICR 388, EAT. **Decision of the Employment Appeal Tribunal affirmed on different grounds** [2001] ICR 805, CA

Post Office v Jones [2001] ICR 805, CA. **Followed,** *Smith v Churchill Stairlifts plc* [2006] ICR 524, CA. **Applied,** *Johnson & Johnson Medical Ltd v Filmer* [2002] ICR 292, EAT; *Wright v Governing Body of Bilton High School* [2002] ICR 1463, EAT; *Murphy v Slough Borough Council* [2004] ICR 1163, EAT; *O'Hanlon v Revenue and Customs Comrs* [2006] ICR 1579, EAT. **Considered,** *O'Hanlon v Revenue and Customs Comrs* [2007] ICR 1359, CA

Poucet v Assurances Générales de France (Cases C-159 and 160/91) [1993] ECR I-637, ECJ. **Considered,** *Brentjens' Handelsonderneming BV v Stichting Bedrijfspensioenfonds voor de Handel in Bouwmaterialen* (Cases C-115–117/97) [2001] ICR 774, ECJ

Practice Direction (EAT: Procedure) [1996] ICR 422, 427 para 9, EAT. **Applied,** *Facey v Midas Retail Security Ltd* [2001] ICR 287, EAT; *Miriki v General Council of the Bar* [2002] ICR 505, CA

Practice Direction (Employment Appeal Tribunal: Procedure) 2002 [2003] ICR 122, EAT. **Applied,** *Khudados v Leggate* [2005] ICR 1013, EAT

Practice Direction (Employment Appeal Tribunal: Procedure) 2004 [2005] ICR 637, EAT. **Considered,** *Woodward v Abbey National plc (No 2)* [2005] ICR 1702, EAT

Pratley v Surrey County Council [2002] EWHC 1608 (QB). **Decision of Buckley J affirmed** [2004] ICR 159, CA

Presentaciones Musicales SA v Secunda [1994] Ch 271; [1994] 2 WLR 660; [1994] 2 All ER 737, CA. **Applied,** *Nottinghamshire Healthcare NHS Trust v Prison Officers' Association* [2003] ICR 1192, EAT

Preston v Wolverhampton Healthcare NHS Trust [1997] ICR 899, CA. **Decision of the Court of Appeal varied** [2001] ICR 217, HL(E)

Preston v Wolverhampton Healthcare NHS Trust [1998] ICR 227; [1998] 1 WLR 280; [1998] 1 All ER 528, HL(E). **Considered,** *Young v National Power plc* [2001] ICR 328, CA

Preston v Wolverhampton Healthcare NHS Trust (Case C-78/98) [2000] ICR 961; [2001] 2 AC 455; [2001] 2 WLR 408; [2000] ECR I-3201, ECJ. **Applied,** *Jeffery v Secretary of State for Education* [2006] ICR 1062, EAT

Preston v Wolverhampton Healthcare NHS Trust (No 3) [2004] ICR 993, EAT. **Decision of the Employment Appeal Tribunal reversed in part** [2005] ICR 222, CA

Preston v Wolverhampton Healthcare NHS Trust (No 3) [2005] ICR 222, CA. **Decision of the Court of Appeal affirmed** [2006] ICR 606, HL(E)

Preston v Wolverhampton Healthcare NHS Trust (No 3) [2004] ICR 993, EAT. **Followed,** *Newcastle upon Tyne City Council v Allan* [2005] ICR 1170, EAT. **Applied,** *Jeffery v Secretary of State for Education* [2006] ICR 1062, EAT

Print Factory (London) 1991 Ltd, The v Millam [2006] IRLR 923, EAT. **Decision of the Employment Appeal Tribunal reversed** [2007] ICR 1331, CA

Prison Service v Beart (No 2) [2005] IRLR 171, EAT. **Decision of the Employment Appeal Tribunal affirmed** [2005] ICR 1206, CA

Prison Service v Johnson [1997] ICR 275, 283, EAT. **Followed,** *Virgo Fidelis Senior School v Boyle* [2004] ICR 1210, EAT. **Dicta of Smith J approved,** *Vento v Chief Constable of West Yorkshire Police* [2003] ICR 318, CA

Providence Capitol Trustees Ltd v Ayres [1996] 4 All ER 760, 763–764, 765. **Dicta of Chadwick J applied,** *Moore's (Wallisdown) Ltd v Pensions Ombudsman* [2002] ICR 773

Puglia v C James & Sons [1996] ICR 301, EAT **Followed,** *Morgans v Alpha Plus Security Ltd* [2005] ICR 525, EAT

Pye (J A) (Oxford) Ltd v Graham [2001] Ch 804; [2001] 2 WLR 1293, CA. **Followed,** *MacDonald v Ministry of Defence* [2002] ICR 174, Ct of Sess

Qua v John Ford Morrison [2003] ICR 482, EAT. **Considered,** *Forster v Cartwright Black* [2004] ICR 1728, EAT; *Truelove v Safeway Stores plc* [2005] ICR 589, EAT

Quinn v Schwarzkopf Ltd [2001] IRLR 67, EAT. **Considered,** *Johnson & Johnson Medical Ltd v Filmer* [2002] ICR 292, EAT

Quirk v Burton Hospitals NHS Trust [2001] ICR 415, EAT. **Decision of the Employment Appeal Tribunal affirmed** [2002] ICR 602, CA

Qureshi v Victoria University of Manchester (Note) [2001] ICR 847, EAT. **Approved,** *Anya v University of Oxford* [2001] ICR 847, CA

R v Broadcasting Corpn, Ex p Lavelle [1983] ICR 99; [1983] 1 WLR 23; [1983] 1 All ER 241. **Applied,** *R (Arthurworrey) v Haringey London Borough Council* [2002] ICR 279

R v British Coal Corpn, Ex p Vardy [1993] ICR 720, 753, DC. **Dicta of Glidewell LJ applied,** *MSF v Refuge Assurance plc* [2002] ICR 1365, EAT

R v Cannings [2004] 1 WLR 2607; [2004] 1 All ER 725; [2004] 2 Cr App R 63, CA. **Considered,** *Meadow v General Medical Council* [2007] ICR 701, CA

R v Director of Public Prosecutions, Ex p Kebilene [2000] 2 AC 326, 386; [1999] 3 WLR 972; [1999] 4 All ER 801, HL(E). **Dicta of Lord Hope of Craighead applied,** *R v Davies (David Janway)* [2003] ICR 586, CA

R v Fawcett (1983) 5 Cr App R(S) 158, CA. **Followed,** *R v Balfour Beatty Rail Infrastructure Services Ltd* [2007] ICR 354, CA

R v Gateway Foodmarkets Ltd [1997] ICR 382; [1997] 3 All ER 78, CA. **Followed,** *R v HTM Ltd* [2006] ICR 1383, CA

R v Gough [1993] AC 646; [1993] 2 WLR 883; [1993] 2 All ER 724, HL(E). **Considered,** *In re Medicaments and Related Classes of Goods (No 2)* [2001] ICR 564, CA

R v Howe (F) & Son (Engineers) Ltd [1999] 2 All ER 249, CA. **Followed,** *R v Balfour Beatty Infrastructure Services Ltd* [2007] ICR 354, CA

R v Kellam, Ex p South Wales Police Authority [2000] ICR 632. **Considered,** *R (Stunt) v Mallett* [2001] ICR 989, CA

R v Lambert [2002] 2 AC 545; [2001] 3 WLR 206; [2001] 1 All ER 577, HL(E). **Applied,** *Pearce v Governing Body of Mayfield Secondary School* [2002] ICR 198, CA

R v Moore (Deborah) [1995] QB 353; [1995] 2 WLR 728; [1995] 4 All ER 843, CA. **Followed,** *R v Patel* [2007] ICR 571, CA

R v Nelson Group Services (Maintenance) Ltd [1999] ICR 1004; [1999] 1 WLR 1526; [1998] 4 All ER 331, CA. **Followed,** *R v HTM Ltd* [2006] ICR 1383, CA

R v Newcastle-under-Lyme Justices, Ex p Massey [1994] 1 WLR 1684, 1692; [1995] 1 All ER 120, DC. **Dicta of Rose LJ applied,** *Moore's (Wallisdown) Ltd v Pensions Ombudsman* [2002] ICR 773

R v Secretary of State for Employment, Ex p Seymour-Smith (Case C-167/97) [1999] ICR 447; [1999] 2 AC 554; [1999] 3 WLR 460; [1999] ECR I-623, ECJ. **Applied,** *Secretary of State for Trade and Industry v Rutherford (No 2)* [2005] ICR 119, EAT and CA; [2006] ICR 785, HL(E)

R v Secretary of State for Employment, Ex p Seymour-Smith (No 2) [2000] ICR 244; [2000] 1 WLR 435; [2000] 1 All ER 857, HL(E). **Applied,** *Secretary of State for Trade and Industry v Rutherford (No 2)* [2005] ICR 119, EAT and CA; [2006] ICR 785, HL(E)

R v Secretary of State for the Home Department, Ex p Jeyeanthan [2000] 1 WLR 354; [1999] 3 All ER 231, CA. **Distinguished,** *Rydqvist v Secretary of State for Work and Pensions* [2002] ICR 1383, CA

R v Secretary of State for the Home Department, Ex p Thornton [1987] QB 36; [1986] 3 WLR 158; [1986] 2 All ER 641, CA. **Distinguished,** *R v Patel* [2007] ICR 571, CA

R v Secretary of State for Social Security, Ex p Moule (unreported) 12 September 1996, Collins J. **Considered,** *Howker v Secretary of State for Work and Pensions* [2003] ICR 405, CA

R v Tarry [1970] 2 QB 560; [1970] 2 WLR 1034; [1970] 2 All ER 185; 54 Cr App R 322, CA. **Followed,** *R v Patel* [2007] ICR 571, CA

R (Amicus—MSF Section) v Secretary of State for Trade and Industry (Christian Action Research Education intervening) [2007] ICR 1176. **Followed,** *R (Equal Opportunities Commission) v Secretary of State for Trade and Industry* [2007] ICR 1234

R (Britannic Asset Management Ltd) v Pensions Ombudsman [2002] EWHC 441 (Admin). **Decision of Lightman J affirmed** [2003] ICR 99, CA

R (Broadcasting, Entertainment, Cinematographic and Theatre Union) v Secretary of State for Trade and Industry (Case C-173/99) [2001] ICR 1152; [2001] 1 WLR 2313; [2001] All ER (EC) 647; [2001] ECR I-4881, ECJ. **Considered,** *Voteforce Associates Ltd v Quinn* [2002] ICR 1, EAT. **Distinguished,** *Marshalls Clay Products Ltd v Caulfield* [2004] ICR 1502, CA

R (Countryside Alliance) v Attorney General [2007] QB 305; [2006] 3 WLR 1017, CA. **Applied,** *R (Malik) v Waltham Forest NHS Primary Care Trust* [2007] ICR 1101, CA

R (Dorling) v Sheffield City Council [2003] ICR 424. **Considered,** *R (Verner) v Derby City Council* [2004] ICR 535

R (Fatnani) v General Medical Council [2006] EWHC 1573 (Admin). **Decision of Collins J reversed** [2007] ICR 811, CA

R (Foster) v Eastbourne Borough Council [2003] EWHC 948 (Admin). **Decision of Moses J affirmed** [2004] ICR 1149, CA

R (Junttan Oy) v Bristol Magistrates' Court [2002] ICR 1523; [2002] 4 All ER 965, DC. **Decision of the Divisional Court of the Queen's Bench Division reversed in part** [2003] ICR 1475, HL(E)

R (Kwik-Fit (GB) Ltd) v Central Arbitration Committee [2002] EWHC 277 (Admin). **Decision of Elias J reversed** [2002] ICR 1212, CA

R (McGinley) v Schilling [2004] EWHC 1617 (Admin). **Decision of McCombe J affirmed** [2005] ICR 1282, CA

R (Madan) v General Medical Council [2001] Lloyd's Rep Med 539, DC. **Distinguished,** *R (Malik) v Waltham Forest Primary Care Trust* [2006] ICR 1111

R (Malik) v Waltham Forest NHS Primary Care Trust [2006] ICR 1111. **Decision of Collins J reversed** [2007] ICR 1101, CA

R (Manson) v Ministry of Defence [2005] EWHC 427 (Admin). **Decision of Moses J affirmed** [2006] ICR 355, CA

R (National Union of Journalists) v Central Arbitration Committee [2005] ICR 493. **Decision of Hodge J affirmed** [2006] ICR 1, CA

R (Nicholds) v Security Industry Authority [2007] ICR 1076. **Approved,** *R (Malik) v Waltham Forest NHS Primary Care Trust* [2007] ICR 1101, CA

R (Steele) v Birmingham City Council [2005] EWHC 783 (Admin) 783. **Decision of Gibbs J reversed** [2006] ICR 869, CA

R (Sussex Police Authority) v Beck (Note) [2006] ICR 570. **Distinguished,** *R (Northumbria Police Authority) v Broome* [2006] ICR 555

R (Touche) v Inner London North Coroner [2001] QB 1206; [2001] 3 WLR 148; [2001] 2 All ER 752, CA. **Considered,** *Moore's (Wallisdown) Ltd v Pensions Ombudsman* [2002] ICR 773

R (Quark Fishing Ltd) v Secretary of State for Foreign and Commonwealth Affairs [2003] EWHC 1743 (Admin). **Distinguished,** *R (Malik) v Waltham Forest NHS Primary Care Trust* [2007] ICR 1101, CA

R (Ultraframe (UK) Ltd) v Central Arbitration Committee [2004] EWHC 112 (Admin). **Decision of Davis J reversed** [2005] ICR 1194, CA

RCO Support Services Ltd v UNISON [2000] ICR 1502, EAT. **Decision of the Employment Appeal Tribunal affirmed** [2002] ICR 751, CA

Race Relations Board v Charter [1973] AC 868; [1973] 2 WLR 299; [1973] 1 All ER 512, HL(E). **Considered,** *Ali v McDonagh* [2002] ICR 1026, CA

Race Relations Board v Dockers' Labour Club and Institute Ltd [1976] AC 285; [1974] 3 WLR 533; [1974] 3 All ER 592, HL(E). **Considered,** *Ali v McDonagh* [2002] ICR 1026, CA

Ransom v Higgs [1974] 1 WLR 1594, 1618; [1974] 3 All ER 949, HL(E). **Dicta of Lord Simon of Glaisdale applied,** *Clark v Perks (No 2)* [2002] ICR 302, CA

Raschid v General Medical Council [2006] EWHC 886 (Admin). **Decision of Collins J reversed** [2007] ICR 811, CA

Rask v ISS Kantineservice A/S (Case C-2009/91) [1992] ECR I-5755, ECJ. **Applied,** *Collino v Telecom Italia SpA* (C-343/98) [2002] ICR 38, ECJ

Raspin v United News Shops Ltd [1999] IRLR 9, EAT. **Not followed,** *Wise Group v Mitchell* [2005] ICR 896, EAT

Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance [1968] 2 QB 497, 515; [1968] 2 WLR 775; [1968] 1 All ER 433. **Applied,** *Montgomery v Johnson Underwood Ltd* [2001] ICR 819, CA. **Dictum of MacKenna J applied,** *Synaptek Ltd v Young* [2003] ICR 1149

Red Bank Manufacturing Co Ltd v Meadows [1992] ICR 204, EAT. **Disapproved,** *Stansbury v Datapulse plc* [2004] ICR 523, CA

Redfearn v Serco Ltd (trading as West Yorkshire Transport Service) [2005] IRLR 744, EAT. **Decision of the Employment Appeal Tribunal reversed** [2006] ICR 1367, CA

Redrow plc v Pedley [2002] Pen LR 339. **Considered,** *Trustee Solutions Ltd v Dubery* [2007] ICR 412

Reed v Stedman [1999] IRLR 299, EAT. **Considered,** *Comr of Police of the Metropolis v Harley* [2001] ICR 927, EAT; *R (Equal Opportunities Commission) v Secretary of State for Trade and Industry* [2007] ICR 1234

Reid v Rush & Tompkins Group plc [1990] ICR 61; [1990] 1 WLR 212; [1989] 3 All ER 228, CA. **Considered,** *Crossley v Faithful & Gould Holdings Ltd* [2004] ICR 1615, CA

Reisebüro Broede v Sandker (Case C-3/95) [1996] ECR I-6511, 6537–6538, para 28, ECJ. **Dicta applied,** *Criminal proceedings against Arblade* (Cases C-369 and 376/96) [2001] ICR 434, ECJ

Reuben v Brent London Borough Council [2000] ICR 102, EAT. **Approved,** *Tran v Greenwich Vietnam Community Project* [2002] ICR 1101, CA. **Doubted,** *Barke v SEETEC Business Technology Centre Ltd* [2005] ICR 1373, CA

Revenue and Customs Comrs v Leisure Employment Services Ltd [2006] ICR 1094, EAT. **Decision of the Employment Appeal Tribunal affirmed** [2007] ICR 1056, CA

Rewe-Zentralfinanz eG v Landwirtschaftskammer für das Saarland (Case 33/76) [1976] ECR 1989, ECJ. **Applied,** *Preston v Wolverhampton Healthcare NHS Trust (No 2)* [2001] ICR 217, HL(E)

Rhys-Harper v Relaxion Group plc [2000] IRLR 810, EAT. **Decision of the Employment Appeal Tribunal affirmed** [2001] ICR 1176, CA

Rhys-Harper v Relaxion Group plc [2001] ICR 1176, CA. **Decision of the Court of Appeal reversed** [2003] ICR 867, HL(E)

Rhys-Harper v Relaxion Group plc [2001] ICR 1176, 1178–1179, CA. **Applied,** *Lawal v Northern Spirit Ltd* [2002] ICR 486, EAT. **Considered,** *Jones v 3M Healthcare Ltd* [2002] ICR 341, EAT. **Observations of Pill LJ explained,** *Jones v 3M Healthcare Ltd* [2002] ICR 1124, CA

Rhys-Harper v Relaxion Group plc [2003] ICR 867; [2003] 4 All ER 1113, HL(E). **Applied,** *Metropolitan Police Service v Shoebridge* [2004] ICR 1690, EAT; *South East Essex College v Abegaze* [2006] ICR 468, EAT. **Considered,** *Baynton v South West Trains Ltd* [2005] ICR 1730, EAT; *Woodward v Abbey National plc (No 1)* [2005] ICR 1750, EAT; [2006] ICR 1436, CA

Rice v Secretary of State for Trade and Industry [2006] EWHC 1257 (QB). **Decision of Silber J affirmed** [2007] ICR 1469, CA

Robb v Salamis (M & I) Ltd 2005 SLT 523. **Decision of an Extra Division of the Inner House of the Court of Session reversed** [2007] ICR 175, HL(Sc)

Roberts v West Coast Trains Ltd [2005] ICR 254, CA. **Applied,** *Brock v Minerva Dental Ltd* [2007] ICR 917, EAT

Robinson v British Island Airways Ltd [1978] ICR 304, EAT. **Considered,** *Shawkat v Nottingham City Hospital NHS Trust (No 2)* [2002] ICR 7, CA

Robinson v Post Office [2000] IRLR 804, EAT. **Followed,** *Apelogun-Gabriels v Lambeth London Borough Council* [2002] ICR 713, CA

Rockfon A/S v Specialarbejderforbundet i Danmark (Case C-449/93) [1996] ICR 673; [1995] ECR I-4291, ECJ. **Applied,** *MSF v Refuge Assurance plc* [2002] ICR 1365, EAT

Rookes v Barnard [1964] AC 1129; [1964] 2 WLR 269; [1964] 1 All ER 367, HL(E). **Considered,** *Virgo Fidelis Senior School v Boyle* [2004] ICR 1210, EAT

Rose v Plenty [1975] ICR 430, 437; [1976] 1 WLR 141; [1976] 1 All ER 97, CA. **Dicta of Scarman LJ applied,** *Lister v Hesley Hall Ltd* [2001] ICR 665, HL(E)

Rossiter v Pendragon plc [2001] ICR 1265, EAT. **Decision of the Employment Appeal Tribunal reversed** [2002] ICR 1063, CA

Rothwell v Chemical & Insulating Co Ltd [2005] EWHC 88 (QB). **Decision of Holland J reversed** [2006] ICR 1458, CA

Rothwell v Chemical & Insulating Co Ltd [2006] ICR 1458; [2006] 4 All ER 1161, CA. **Decision of the Court of Appeal affirmed** [2007] ICR 1745, HL(E)

Rovenska v General Medical Council [1998] ICR 85, 94, CA. **Dicta of Brooke LJ applied,** *Chaudhary v Royal College of Surgeons* [2003] ICR 1510, CA

Roy v Kensington and Chelsea and Westminster Family Practitioner Committee [1990] 1 Med LR 328, CA. **Not followed,** *North Essex Health Authority v David-John* [2004] ICR 112, EAT

Royal Society for the Protection of Birds v Croucher [1984] ICR 604, EAT. **Considered,** *Whitbread plc (trading as Whitbread Medway Inns) v Hall* [2001] ICR 699, CA

Roylance v General Medical Council (No 2) [2000] 1 AC 311; [1999] 3 WLR 541, PC. **Applied,** *Meadow v General Medical Council* [2007] ICR 701, CA

Rubenstein v McGloughlin [1997] ICR 318, EAT. **Not followed,** *Morgans v Alpha Plus Security Ltd* [2005] ICR 525, EAT

Rutherford v Owens-Illinois Inc (1997) 67 Cal Rptr 2d 16. **Considered,** *Fairchild v Glenhaven Funeral Services Ltd* [2002] ICR 798, HL(E)

Rutten v Cross Medical Ltd (Case C-383/95) [1997] ICR 715; [1997] ECR I-57, ECJ. **Considered,** *Weber v Universal Ogden Services Ltd* (Case C-37/00) [2002] ICR 979, ECJ

Sadler v General Medical Council [2003] 1 WLR 2259, PC. **Distinguished,** *Watson v General Medical Council* [2006] ICR 113

Sadler v Imperial Assurance Co of Canada Ltd [1988] IRLR 388, 391–392. **Dicta of P J Crawford QC approved,** *Beckett Investment Management Group Ltd v Hall* [2007] ICR 1539, CA

Saeed v Royal Wolverhampton Hospitals NHS Trust [2000] Lloyd's Rep Med 331. **Decision of Gage J affirmed** [2001] ICR 903, CA

Saeed v Royal Wolverhampton Hospitals NHS Trust [2001] ICR 903, CA. **Applied,** *Skidmore v Dartford & Gravesham NHS Trust* [2002] ICR 403, CA. **Considered,** *Skidmore v Dartford & Gravesham NHS Trust* [2003] ICR 721, CA

Saggar v Ministry of Defence [2004] ICR 1708, EAT. **Decision of the Employment Appeal Tribunal reversed** [2005] ICR 1073, CA

Sainsbury (J) Ltd v Savage [1981] ICR 1, CA. **Considered,** *Roberts v West Coast Trains Ltd* [2005] ICR 254, CA

St Basil's Centre Ltd v McCrossan [1992] ICR 140, EAT. **Considered,** *Consignia plc (formerly The Post Office) v Sealy* [2002] ICR 1193, CA

Sajid v Sussex Muslim Society [2002] IRLR 113, CA. **Applied,** *Verdin v Harrods Ltd* [2006] ICR 396, EAT. **Considered,** *Ako v Rothschild Asset Management Ltd* [2002] ICR 899, CA; *Fraser v HLMAD Ltd* [2006] ICR 1395, CA

Saligueira da Silva Mouta v Portugal [2001] 1 FCR 653, ECHR. **Considered,** *Macdonald v Ministry of Defence* [2001] ICR 1, EAT(Sc); [2002] ICR 174, Ct of Sess

Sandoz prodotti farmaceutici SpA v Commission of the European Communities (Case C-277/87) (Summary publication) [1990] ECR I-45, ECJ. **Distinguished,** *Bayer AG v Commission of the European Communities* (Case T-41/96) [2001] ICR 735, CFI

Savory v Holland & Hannen & Cubitts (Southern) Ltd [1964] 1 WLR 1158; [1964] 3 All ER 18, CA. **Considered,** *Makepeace v Evans Bros (Reading)* [2001] ICR 241, CA

Sawyer v Ahsan [2000] ICR 1, EAT. **Considered,** *Secretary of State for Scotland v Mann* [2001] ICR 1005, EAT (Sc). **Overruled,** *Ali v McDonagh* [2002] ICR 1026, CA

Scally v Southern Health and Social Services Board [1991] ICR 771; [1992] 1 AC 294; [1991] 3 WLR 778; [1991] 4 All ER 563, HL(NI). **Applied,** *Outram v Academy Plastics Ltd* [2001] ICR 367, CA. **Distinguished,** *Crossley v Faithful & Gould Holdings Ltd* [2004] ICR 1615, CA

Schmidt v Spar- und Leihkasse der früheren Ämter Bordesholm, Keil und Cronshagen (Case C-392/92) [1995] ICR 237; [1994] ECR I-1311, ECJ. **Considered,** *Dudley Bower Building Services Ltd v Lowe* [2003] ICR 843, EAT

Scotford v SmithKline Beecham [2002] ICR 264, EAT. **Distinguished,** *Sian v Abbey National plc* [2004] ICR 55, EAT. **Disapproved,** *Gdynia America Shipping Lines (London) Ltd v Chelminski* [2004] ICR 1523, CA

Scotts Co (UK) Ltd, The v Budd [2004] ICR 299, EAT. **Followed,** *Langley v Burlo* [2006] ICR 850, EAT

Secretary of State for Education and Science v Tameside Metropolitan Borough Council [1977] AC 1014; [1976] 3 WLR 641; [1976] 3 All ER 665, HL(E). **Applied,** *IBA Healthcare Ltd v Office of Fair Trading* [2004] ICR 1364, CA

Secretary of State for Employment v Mann [1999] ICR 898, HL(E). **Considered,** *Titchener v Secretary of State for Trade and Industry* [2002] ICR 225, EAT

Secretary of State for Trade and Industry v Bottrill [1999] ICR 592; [2000] 1 All ER 915, CA. **Followed,** *Connolly v Sellers Arenascene Ltd* [2001] ICR 760, CA. **Applied,** *Gladwell v Secretary of State for Trade and Industry* [2007] ICR 264, EAT

Secretary of State for Trade and Industry v Rutherford (No 2) [2005] ICR 119, EAT. **Decision of the Employment Appeal Tribunal affirmed** [2005] ICR 119, EAT and CA

Secretary of State for Trade and Industry v Rutherford (No 2) [2005] ICR 119, CA. **Decision of the Court of Appeal affirmed** [2006] ICR 785, HL(E)

Securicor Omega Express Ltd v GMB [2004] IRLR 9, EAT. **Considered,** *Cranswick Country Food plc v Beall* [2007] ICR 691, EAT

Selfridges Ltd v Malik [1998] ICR 268, EAT. **Approved,** *Parry v National Westminster Bank plc* [2005] ICR 396, CA

Selkent Bus Co Ltd v Moore [1996] ICR 836, EAT. **Considered,** *Street v Derbyshire Unemployed Workers' Centre* [2004] ICR 213, EAT

Shamoon v Chief Constable of the Royal Ulster Constabulary [2001] IRLR 520, CA(NI). **Decision of the Court of Appeal in Northern Ireland affirmed on different grounds** [2003] ICR 337, HL(NI)

Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337; [2003] 2 All ER 26, HL(NI). **Aplied,** *Fletcher v NHS Pensions Agency* [2005] ICR 1458, EAT. **Distinguished,** *Barton v Investec Henderson Crosthwaite Securities Ltd* [2003] ICR 1205, EAT

Sharp v Caledonia Group Services Ltd [2006] ICR 218, EAT. **Not followed,** *Villalba v Merrill Lynch & Co Inc* [2007] ICR 469, EAT

Sheffield v Oxford Controls Ltd [1979] ICR 396, EAT. **Followed,** *Catherall v Michelin Tyres plc* [2003] ICR 28, EAT. **Distinguished,** *Sandhu v Jan de Rijk Transport Ltd* [2007] ICR 1137, CA

Shepherd (F C) & Co Ltd v Jerrom [1985] ICR 552, EAT. **Considered,** *Rai v Somerfield Stores Ltd* [2004] ICR 656, EAT

Shergold v Fieldway Medical Centre [2006] ICR 304, EAT. **Applied,** *Spillett v Tesco Stores Ltd* [2006] ICR 643, EAT. **Considered,** *Canary Wharf Management Ltd v Edebi* [2006] ICR 719, EAT

Sheriff v Klyne Tugs (Lowestoft) Ltd [1999] ICR 1170, 1178–1179, para 22, CA. **Dictum of Stuart-Smith LJ applied,** *Essa v Laing Ltd* [2003] ICR 1110, EAT; [2004] ICR 746, CA

Showboat Entertainment Centre Ltd v Owens [1984] ICR 65; [1984] 1 WLR 384; [1984] 1 All ER 836, EAT. **Considered,** *Redfearn v Serco Ltd (trading as West Yorkshire Transport Service)* [2006] ICR 1367, CA

Sian v Abbey National plc [2004] ICR 55, EAT. **Approved,** *Gdynia America Shipping Lines (London) Ltd v Chelminski* [2004] ICR 1523, CA

Sidhu v Aerospace Composite Technology Ltd [1999] IRLR 683, EAT. **Decision of the Employment Appeal Tribunal reversed** [2001] ICR 167, CA

Sim v Rotherham Metropolitan Borough Council [1986] ICR 897, 935–936; [1987] Ch 216; [1986] 3 WLR 851; [1986] 3 All ER 387. **Dicta of Scott J considered,** *Item Software (UK) Ltd v Fassihi* [2005] ICR 450, CA

Simmons v British Steel plc 2003 SLT 62. **Decision of the Second Division of the Inner House of the Court of Session affirmed on different grounds** [2004] ICR 585, HL(Sc)

Simmons v British Steel plc [2004] ICR 585, HL(Sc). **Considered,** *Corr v IBC Vehicles Ltd* [2006] ICR 1138, CA

Simper (Peter) & Co Ltd v Cooke [1986] IRLR 19, EAT. **Distinguished,** *Southwark London Borough Council v Jiminez* [2003] ICR 1176, CA

Simpson v Norwest Holst Southern Ltd [1980] 1 WLR 968; [1980] 2 All ER 471, CA. **Followed,** *Cressey v E Timm & Son Ltd (Practice Note)* [2006] ICR 282, CA

Sindicato de Médicos de Asistencia Pública (SIMAP) v Consellería de Sanidad y Consumo de la Generelidad Valenciana (Case C-303/98) [2001] ICR 1116; [2001] All ER (EC) 609; [2000] ECR I-7963, ECJ. **Applied,** *Landeshauptstadt Kiel v Jaeger* (Case C-151/02) [2004] ICR 1528, ECJ; *Pfeiffer v Deutsches Rotes Kreuz, Kreisverbvand Waldshut eV* (Cases C-397–403/01) [2005] ICR 1307, ECJ; *MacCartney v Oversley House Management* [2006] ICR 510, EAT. **Considered,** *Gallagher v Alpha Catering Services Ltd (trading as Alpha Flight Services)* [2005] ICR 673, CA

Skidmore v Dartford & Gravesham NHS Trust [2001] ICR 911, EAT. **Decision of the Employment Appeal Tribunal reversed** [2002] ICR 403, CA

Skidmore v Dartford & Gravesham NHS Trust [2002] ICR 403, CA. **Decision of the Court of Appeal affirmed** [2003] ICR 721, HL(E)

Skyrail Oceanic Ltd v Coleman [1981] ICR 864, 873, CA. **Applied,** *Chamberlin v Emokpae* [2004] ICR 1476, EAT. **Dictum of Lawton LJ not followed,** *Essa v Laing Ltd* [2003] ICR 1110, EAT

Smith v Avdel Systems Ltd (Case C-408/92) [1995] ICR 596; [1994] ECR I-4435, ECJ. **Applied,** *Harland & Wolff Pension Trustees Ltd v Aon Consulting Financial Services Ltd* [2007] ICR 429

Smith v Churchill Stairlifts plc (unreported) 2 December 2004, EAT. **Decision of the Employment Appeal Tribunal** reversed [2006] ICR 524, CA

Smith v Gardner Merchant Ltd [1999] ICR 134; [1998] 3 All ER 852, CA. **Followed,** *Macdonald v Ministry of Defence* [2002] ICR 174, Ct of Sess. **Applied,** *Pearce v Governing Body of Mayfield Secondary School* [2002] ICR 198, CA. **Considered,** *Macdonald v Ministry of Defence; Pearce v Governing Body of Mayfield Secondary School* [2003] ICR 937, HL(E & Sc). **Not followed,** *Macdonald v Ministry of Defence* [2001] ICR 1, EAT(Sc)

Smith v United Kingdom (1999) 29 EHRR 493. **Considered,** *Macdonald v Ministry of Defence* [2001] ICR 1, EAT(Sc); [2002] ICR 174, Ct of Sess

Smoker v London Fire and Civil Defence Authority [1991] ICR 449; [1991] 2 AC 502; [1991] 2 WLR 1052; [1991] 2 All ER 449, HL(E). **Applied,** *Knapton v ECC Card Clothing Ltd* [2006] ICR 1084, EAT

Sogbetun v Hackney London Borough Council [1998] ICR 1264, EAT. **Considered,** *Gladwell v Secretary of State for Trade and Industry* [2007] ICR 264, EAT. **Not followed,** *Morgan v Brith Gof Cyf* [2001] ICR 978, EAT

Soteriou v Ultrachem Ltd [2004] IRLR 870. **Considered,** *Fraser v HLMAD Ltd* [2006] ICR 1395, CA

South Ayrshire Council v Morton [2001] IRLR 28, EAT(Sc). **Decision of the Employment Appeal Tribunal affirmed** [2002] ICR 956, Ct of Sess

South Central Trains Ltd v Rodway [2005] ICR 75, EAT. **Decision of the Employment Appeal Tribunal affirmed** [2005] ICR 1162, CA

Southwark (Diocese of) v Coker [1998] ICR 140, CA. **Considered,** *Percy v Board of National Mission of the Church of Scotland* [2006] ICR 134, HL(Sc)

Southwark London Borough Council v Bartholomew [2004] ICR 358, EAT. **Considered,** *Cooke v Glenrose Fish Co* [2004] ICR 1188, EAT

Southwark London Borough Council v Whillier [2001] ICR 142, EAT. **Decision of the Employment Appeal Tribunal affirmed** [2001] ICR 1016, CA

Specialarbeiterforbundet i Danmark v Dansk Industrie, acting for Royal Copenhagen A/S (Case C-400/93) [1996] ICR 51; [1995] ECR I-1275, ECJ. **Distinguished,** *Cheshire and Wirral Partnership NHS Trust v Abbott* [2006] ICR 1267, CA

Spijkers v Gebroeders Benedik Abattoir CV (Case 24/85) [1986] ECR 1119, 1128–1129, ECJ. **Dicta applied,** *RCO Support Services Ltd v UNISON* [2002] ICR 751, CA

Spillers-French (Holdings) Ltd v Union of Shop, Distributive and Allied Workers [1980] ICR 31; [1980] 1 All ER 231, EAT. **Overruled,** *Susie Radin Ltd v GMB* [2004] ICR 893, CA

Spring v Guardian Assurance plc [1994] ICR 596, 612, 647; [1995] 2 AC 296; [1994] 3 WLR 354; [1994] 4 All ER 563, HL(NI). **Dicta of Lord Goff of Chieveley applied,** *Lennon v Comr of Police of the Metropolis* [2004] ICR 1114, CA. **Considered,** *Bank of Credit and Commerce International SA v Ali (No 2)* [2002] ICR 1258, CA. **Dicta of Lord Woolf considered,** *Crossley v Faithful & Gould Holdings Ltd* [2004] ICR 1615, CA

Staffordshire County Council v Barber [1996] ICR 379; [1996] 2 All ER 748, CA. **Distinguished,** *Ako v Rothschild Asset Management Ltd* [2002] ICR 899, CA

Stanton v Callaghan [2000] QB 75; [1999] 2 WLR 745; [1998] 4 All ER 961, CA. **Considered,** *Meadow v General Medical Council* [2007] ICR 701, CA

Stenhouse Australia Ltd v Phillips [1974] AC 391, 404; [1974] 2 WLR 134; [1974] 1 All ER 117, PC. **Dicta of Lord Wilberforce applied,** *Beckett Investment Management Group Ltd v Hall* [2007] ICR 1539, CA

Steria Ltd v Hutchison [2006] Pen LR 13. **Decision of Peter Smith J reversed** [2007] ICR 445, CA

Stevedoring & Haulage Services Ltd v Fuller [2001] IRLR 627, CA. **Distinguished,** *Cable & Wireless plc v Muscat* [2006] ICR 975, CA

Steymann v Staatssecretaris van Justitie (Case 196/87) [1988] ECR 6159, ECJ. **Applied,** *R (Payir) v Secretary of State for the Home Department* [2006] ICR 188

Stokes v Guest, Keen & Nettlefold (Bolts and Nuts) Ltd [1968] 1 WLR 1776. **Applied,** *Barber v Somerset County Council* [2004] ICR 457, HL(E)

Stovin v Wise [1996] AC 923, 932; [1996] 3 WLR 388; [1996] 3 All ER 801, HL(E). **Dicta of Lord Nicholls of Birkenhead applied,** *Rice v Secretary of State for Trade and Industry* [2007] ICR 1469, CA

Strathclyde Regional Council v Wallace [1998] ICR 205, 212; [1998] 1 WLR 259; [1998] 1 All ER 394, HL(Sc). **Dicta of Lord Browne-Wilkinson considered,** *Nelson v Carillion Services Ltd* [2003] ICR 1256, CA

Street v Derbyshire Unemployed Workers' Centre [2004] ICR 213, EAT. **Decision of the Employment Appeal Tribunal affirmed** [2005] ICR 97, CA

Summers (John) & Sons Ltd v Frost [1955] AC 740; [1955] 2 WLR 825; [1955] 1 All ER 870, HL(E). **Applied,** *Robb v Salamis (M & I) Ltd* [2007] ICR 175, HL(Sc)

Sutcliffe v Hawker Siddeley Aviation Ltd [1973] ICR 560, NIRC. **Considered,** *Comr of Police of the Metropolis v Harley* [2001] ICR 927, EAT

Süzen v Zehnacker Gebäudereinigung GmbH Krankenhausservice (Case C-13/95) [1997] ICR 662, 670, para 12; [1997] ECR I-1259, ECJ. **Dicta applied,** *Liskojärvi v Oy Liikojärvi Ab* (Case C-172/99) [2002] ICR 155, ECJ. **Considered,** *RCO Support Services Ltd v UNISON* [2002] ICR 751, CA

Swaddling v Adjudication Officer (Case C-90/97) [1999] ECR I-1075, ECJ. **Applied,** *Collins v Secretary of State for Work and Pensions* [2006] ICR 1033, CA

T, Petitioner 1997 SLT 734. **Considered,** *Macdonald v Ministry of Defence* [2001] ICR 1, EAT(Sc)

Talke Fashions Ltd v Amalgamated Society of Textile Workers and Kindred Trades [1977] ICR 833; [1978] 1 WLR 558; [1978] 2 All ER 649, EAT. **Overruled,** *Susie Radin Ltd v GMB* [2004] ICR 893, CA

Tarnesby v Kensington and Chelsea and Westminster Area Health Authority (Teaching) [1981] ICR 615, HL(E). **Distinguished,** *R (Dorling) v Sheffield City Council* [2003] ICR 424

Tattari v Private Patients Plan Ltd [1998] ICR 106, CA. **Applied,** *Ali v McDonagh* [2002] ICR 1026, CA

Taylor v Director of the Serious Fraud Office [1999] 2 AC 177; [1998] 3 WLR 1040; [1998] 4 All ER 801, HL(E). **Considered,** *Meadow v General Medical Council* [2007] ICR 701, CA

Ten Oever v Stichting Bedrijfspensioenfonds voor het Glazenwassers- en Schoomaakbedriff (Case C-109/91) [1995] ICR 74; [1993] ECR I-4879, ECJ. **Applied,** *Quirk v Burton Hospitals NHS Trust* [2001] ICR 415, EAT

Terhoeve v Inspecteur van de Belastingdienst Particulieren/Ondernemingen Buitenland (Case C-18/95) [1999] ICR I-345, 391, para 45, ECJ. **Dicta applied,** *Criminal proceedings against Arblade* (Cases C-369 and 376/96) [2001] ICR 434, ECJ

Thomas v Times Book Co Ltd [1966] 1 WLR 911; [1966] 2 All ER 241. **Distinguished,** *Moore's (Wallisdown) Ltd v Pensions Ombudsman* [2002] ICR 773

Thornett v Scope [2007] ICR 236, CA. **Applied,** *Software 2000 Ltd v Andrews* [2007] ICR 825, EAT

Thorpe v Dul [2003] ICR 1556, EAT. **Considered,** *Flett v Matheson* [2006] ICR 673, CA

Thrells Ltd v Lomas [1993] 1 WLR 456; [1993] 2 All ER 546. **Considered,** *BEC Pension Trustee Ltd v Sheppeck* [2002] ICR 1343

Tigana Ltd v Decoro Ltd [2003] Eu LR 189. **Considered,** *Lonsdale (trading as Lonsdale Agencies) v Howard & Hallam Ltd* [2006] ICR 584, CA

Tinnelly & Sons Ltd v United Kingdom (1998) 27 EHRR 249. **Distinguished,** *Matthews v Ministry of Defence* [2003] ICR 247, HL(E)

Tinsley v Milligan [1994] 1 AC 340; [1993] 3 WLR 126; [1993] 3 All ER 65, HL(E). **Considered,** *Hall v Woolston Hall Leisure Ltd* [2001] ICR 99, CA

Tipp-Ex GmbH & Co KG v Commission of the European Communities (Case C-279/87) (Summary publication) [1990] ECR I-261, ECJ. **Distingushed,** *Bayer AG v Commission of the European Communities* (Case T-41/96) [2001] ICR 735, CFI

Todd v British Midland Airways Ltd [1976] ICR 959, CA. **Approved,** *Lawson v Serco Ltd* [2006] ICR 250, HL(E). **Considered,** *Crofts v Cathay Pacific Airways Ltd* [2005] ICR 1436, CA

Toshoku Finance UK plc, In re [2002] 1 WLR 671; [2002] 3 All ER 961, HL(E). **Considered,** *In re Allders Department Stores Ltd* [2005] ICR 867

Tran v Greenwich Vietnam Community Project [2002] ICR 1101, CA. **Considered,** *Burns v Royal Mail Group plc (formerly Consignia plc)* [2004] ICR 1103, EAT; *Barke v SEETEC Business Technology Centre Ltd* [2005] ICR 1373, CA

Transport & General Workers' Union v Mckinnon, J R Haulage Ltd [2001] ICR 1281, EAT(Sc). **Not followed,** *Alamo Group (Europe) Ltd v Tucker* [2003] ICR 829, EAT

Transport and General Workers' Union v Webber [1990] ICR 711, EAT. **Followed,** *Beaumont v Amicus* [2007] ICR 341, EAT

Trapp v Mackie [1979] 1 WLR 377, 379; [1977] 1 All ER 489, HL(Sc). **Dicta of Lord Diplock applied,** *Heath v Comr of Police of the Metropolis* [2005] ICR 329, CA

Trotman v North Yorkshire County Council [1999] LGR 584, CA. **Overruled,** *Lister v Hesley Hall Ltd* [2001] ICR 665, HL(E)

Tyldesley v TML Plastics Ltd [1996] ICR 356, EAT. **Considered,** *Parliamentary Comr for Administration and the Health Service Comrs v Fernandez* [2004] ICR 123

UK Waste Control Ltd v Wren [1995] ICR 974, EAT. **Approved,** *Alderson v Secrectary of State for Trade and Industry* [2004] ICR 512, CA

UPS Europe SA v Commission of the European Communities (Case T-175/99) [2002] ECR II-1915, CFI. **Considered,** *Getmapping plc v Ordnance Survey* [2003] ICR 1

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Western Excavating (ECC) Ltd v Sharp [1978] ICR 221; [1978] QB 761; [1978] 2 WLR 344; [1978] 1 All ER 713, CA. **Applied,** *Rossiter v Pendragon plc* [2002] ICR 1063, CA

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- 1870 **Apportionment Act** (33 & 34 Vict c 35)
  - s 2: Item Software (UK) Ltd v Fassihi [2005] ICR 450, CA
- 1890 **Partnership Act** (53 & 54 Vict c 39)
  - s 5: Dave v Robinska [2003] ICR 1248, EAT
- 1921 **Church of Scotland Act** (11 & 12 Geo 5, c 29)
  - s 1(3) (as substituted): Cadman v Health and Safety Executive (Equal Opportunites Commission intervening) (Case C-17/05) [2006] ICR 1623, ECJ
  - s 3, Sch, art IV: Percy v Board of National Mission of the Church of Scotland [2006] ICR 134, HL(Sc)
- 1925 **Trustee Act** (15 & 16 Geo 5, c 19)
  - s 15: Bradstock Group Pension Scheme Trustees Ltd v Bradstock Group plc [2002] ICR 1427
- 1933 **Children and Young Persons Act** (23 Geo 5, c 12)
  - ss 18, 30(1) (as amended): Addison (trading as Brayton News) v Ashby [2003] ICR 667, EAT
- 1945 **Law Reform (Contributory Negligence) Act** (8 & 9 Geo 6, c 28)
  - s 1(1): Anderson v Newham College of Further Education [2003] ICR 212, CA
- 1947 **Crown Proceedings Act** (10 & 11 Geo 6 c 44)
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- 1949 **British Transport Commission Act** (12 & 13 Geo 6, c xxix)
  - s 53(1) (as amended): Spence v British Railways Board [2001] ICR 232, EAT
- 1953 **Registration Service Act** (1 & 2 Eliz 2, c 37)
  - s 6(4): Lincolnshire County Council v Hopper [2002] ICR 1301, EAT
- 1957 **Occupiers' Liability Act** (5 & 6 Eliz 2 c 31)
  - s 2: Fairchild v Glenhaven Funeral Services Ltd [2002] ICR 412, CA
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- 1970 **Equal Pay Act** (c 41)
  - s 1 (as substituted): Department for Environment Food and Rural Affairs v Robertson [2004] ICR 1289, EAT; [2005] ICR 750, CA
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  - s 1(1), Sch 1, para 8(1): Kirton v Tetrosyl Ltd [2003] ICR 37, 1237, CA
  - s 1(1)(2) (as amended): Alabaster v Barclays Bank plc (formerly Woolwich plc) [2005] ICR 1246, CA
  - ss 1(1)(2), 2(4) (as substituted): Preston v Wolverhampton Healthcare NHS Trust (No 3) [2004] ICR 993, EAT
  - s 1(3) (as substituted): Barton v Investec Henderson Crosthwaite Securities Ltd [2003] ICR 1205, EAT
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    - Cadman v Health and Safety Executive (Equal Opportunities Commission intervening) (Case C-17/05) [2006] ICR 1623, ECJ
  - s 1(6) (as amended): Allonby v Accrington and Rossendale College [2001] ICR 1189, CA
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  - ss 2(1)(4) (as substituted), 2ZA(2)(3) (as inserted): Newcastle upon Tyne City Council v Allan [2005] ICR 1170, EAT
  - s 2(4): Jeffery v Secretary of State for Education [2006] ICR 1062, EAT
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s 7(2)(b): Chief Constable of the West Yorkshire Police v A (No 2) [2003] ICR 161

ss 54(1), 56(1), 57: Essa v Laing Ltd [2003] ICR 1110, EAT

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1972 **European Communities Act** (c 68)

s 2(2): Transport and General Workers' Union v Swissport (UK) Ltd [2007] ICR 1593, EAT
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s 112(2): Nicholls v Greenwich London Borough Council [2003] ICR 1020, CA

1973 **Matrimonial Causes Act** (c 18)

s 11(c): KB v National Health Service Pensions Agency (Case C-117/01) [2004] ICR 781, ECJ

1974 **Health and Safety at Work etc Act** (c 37)

s 2(1): Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland (Case C-127/05) [2007] ICR 1393, ECJ

ss 2(1), 40: R v HTM Ltd [2006] ICR 1383, CA

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s 3(1): R v Balfour Beatty Rail Infrastructure Services Ltd [2007] ICR 354, CA

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s 22 (as amended): Railtrack plc v Smallwood [2001] ICR 714

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s 35: Barnes v Leavesley [2001] ICR 38, EAT

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1975 **Sex Discrimination Act** (c 65)

ss 1, 6: Blundell v Governing Body of St Andrew's Catholic Primary School [2007] ICR 1451, EAT

s 1(1): Ashton v Chief Constable of West Mercia Constabulary [2001] ICR 67, EAT
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ss 1(1), 63A(2) (as amended and inserted): University of Huddersfield v Wolff [2004] ICR 828, EAT

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s 1(2)(b)(ii) (as substituted): Hardy & Hansons plc v Lax [2005] ICR 1565, CA

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s 6(2)(6): Hoyland v Asda Stores Ltd [2005] ICR 1235, EAT(Sc)

s 6(6): Newcastle upon Tyne City Council v Allan [2005] ICR 1170, EAT

ss 7, 7B(2)(a) (as inserted): Chief Constable of the West Yorkshire Police v A (No 2) [2002] ICR 552, EAT

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s 10(1) (as amended): Saggar v Ministry of Defence [2004] ICR 1708, EAT

ss 11(1) (as amended): Dave v Robinska [2003] ICR 1248, EAT

s 13(1): Secretary of State for Scotland v Mann [2001] ICR 1005, EAT(Sc)

s 14 (as substituted): Fletcher v Blackpool NHS Pensions Agency [2005] ICR 1458, EAT

1975 **Sex Discrimination Act**—*continued*

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s 41(2): Yearwood v Comr of Police of the Metropolis [2004] ICR 1660, EAT

s 42: Miles v Gilbank [2006] ICR 12, EAT; [2006] ICR 1297, CA

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ss 14, 17: In re Medicaments and Related Classes of Goods (No 3) [2001] ICR 306, RP Ct

1976 **Fatal Accidents Act** (c 30)

s 1: Corr v IBC Vehicles Ltd [2006] ICR 1138, CA

s 4 (as substituted): McIntyre v Harland & Wolff plc [2006] ICR 1222, CA

s 98A(1)(2) (as inserted): Alexander v Brigden Enterprises Ltd [2006] ICR 1277, EAT

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s 1(3): Glover v Staffordshire Police Authority [2007] ICR 661

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ss 1(1)(a), 32(1): Sidhu v Aerospace Composite Technology Ltd [2001] ICR 167, CA

s 1(1)(a)(1A) (as inserted): Redfearn v Serco Ltd (trading as West Yorkshire Transport Service) [2006] ICR 1367, EAT

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s 32(2): Yearwood v Comr of Police of the Metropolis [2004] ICR 1660, EAT

s 33(1): Anyanwu v South Bank Student Union (Commission for Racial Equality intervening) [2001] ICR 391, HL(E)
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s 68(7)(b): Comr of Police of the Metropolis v Hendricks [2003] ICR 530, CA
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EUROPEAN COMMUNITY ENACTMENTS JUDICIALLY CONSIDERED

ICR 2001–2007

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  - Sánchez Hidalgo v Asociación de Servicios Aser (Case C-173/96) (Note) [2002] ICR 73, ECJ
  - Liskojärvi v Oy Liikenne Ab (Case C-172/99) [2002] ICR 155, ECJ
  - Mayeur v Association Promotion de l'Information Messine (APIM) (Case C-175/99) [2002] ICR 1316, ECJ
  - Perth and Kinross Council v Donaldson [2004] ICR 667, EAT(Sc)
- art 1(3): NUMAST v P & O Scottish Ferries Ltd [2005] ICR 1270, EAT(Sc)
- art 3: Beckmann v Dynamco Whicheloe Macfarlane Ltd (Case C-164/00) [2003] ICR 50, ECJ
  - Martin v South Bank University (Case C-04/01) [2004] ICR 1234, ECJ
- art 3(1): Martin v Lancashire County Council [2001] ICR 197, CA
  - CELTEC Ltd v Astley [2002] ICR 1289, CA
  - CELTEC Ltd v Astley (Case C-478/03) [2005] ICR 1409, ECJ
  - North Wales Training and Enterprise Council (trading as CELTEC Ltd) v Astley [2006] ICR 992, HL(E)
- art 4(2): Rossiter v Pendragon plc [2001] ICR 1265, EAT; [2002] ICR 1063, CA

Council Directive 79/7/EEC
- art 3(1): Hockenjos v Secretary of State for Social Security [2001] ICR 966, CA
- art 4: Walter v Secretary of State for Social Security [2002] ICR 540, CA
- art 4(1): Richards v Secretary of State for Work and Pensions (Case C-423/04) [2006] ICR 1181, ECJ

Council Directive 80/987/EEC
- art 4(3): Titchener v Secretary of State for Trade and Industry [2002] ICR 225, EAT
- art 8: Robins v Secretary of State for Work and Pensions (Case C-278/05) [2007] ICR 779, ECJ

Council Directive 86/653/EEC
- art 17: Lonsdale (trading as Lonsdale Agencies) v Howard & Hallam Ltd [2006] ICR 584, CA
  - Lonsdale (trading as Lonsdale Agencies) v Howard & Hallam Ltd (Winemakers' Federation of Australia Inc intervening) [2007] ICR 1338, HL(E)

- Council Directive 89/391/EEC
  - art 2: Sindicato de Mèdicos de Asistencia Pública (SIMAP) v Consellería de Sandid y Consumo de la Generalidad Valenciana (Case C-303/98) [2001] ICR 1116, ECJ
  - art 2(2): Pfeiffer v Deutsches Rotes Kreuz Kreisverband Waldshut eV (Cases C-397–403/01) [2005] ICR 1307, ECJ
  - art 5: Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland (Case C-127/05) [2007] ICR 1393
- Council Directive 89/655/EEC
  - art 3(1), Annex, r 2.6: Robb v Salamis (M & I) Ltd [2007] ICR 175, HL(Sc)
- Council Directive 90/269/EEC
  - art 3: King v Sussex Ambulance Service NHS Trust [2002] ICR 1413, CA
- Council Directive 90/364/EEC
  - art 1(1): Baumbast v Secretary of State for the Home Department (Case C-413/99) [2003] ICR 1347, ECJ
- Council Directive 92/50/EEC
  - art 3(1): Liskojärvi v Oy Liikenne Ab (Case C-172/99) [2002] ICR 155, ECJ
- Council Directive 92/85/EEC
  - art 10: Tele Danmark A/S v Handels- og Kontorfunktionærernes Forbund i Danmark (HK) (acting on behalf of Brandt-Nielsen) (Case C-109/00) [2004] ICR 610, ECJ
  - art 11(2)(a): Merino Gómez v Continental Industrias del Caucho SA (Case C-342/01) [2005] ICR 1040, ECJ
- Council Directive 93/96/EEC
  - art 1: Grzelczyk v Centre public d'aide sociale Ottignies-Louvain-la-Neuve (Case C-184/99) [2002] ICR 566, ECJ
- Council Drective 93/104/EC
  - arts 1(3), 6(2), 18(1)(b)(i): Pfeiffer v Deutsches Rotes Kreuz, Kreisverband Waldshut eV (Cases C-397–403/01) [2005] ICR 1307, ECJ
  - arts 2, 6, 18(1)(b)(i): Sindicato de Médicos de Asistencia Pública (SIMAP) v Consellería de Sanidad y Consumo de la Generalidad Valanciana (Case C-303/98) [2001] ICR 1116, ECJ
  - arts 2(1), 3, 17(2): Landeshauptstadt Kiel v Jaeger (Case C-151/02) [2004] ICR 1528, ECJ
  - arts 3, 4, 17(1): Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland (Case C-484/04) [2007] ICR 592, ECJ
  - art 7: Bamsey v Albon Engineering and Manufacturing plc [2003] ICR 1224, EAT; [2004] ICR 1083, CA
    - MPB Structures Ltd v Munro [2004] ICR 430, Ct of Sess
    - Marshalls Clay Products Ltd v Caulfield [2004] ICR 1502, CA
    - Robinson-Steele v RD Retail Services Ltd (Cases C-131 and 257/04) [2006] ICR 932, ECJ
  - art 7(1): R (Broadcasting, Entertainment, Cinematographic and Theatre Union) v Secretary of State for Trade and Industry (Case C-173/99) [2001] ICR 1152, ECJ
    - Merino Gómez v Continental Industrias del Caucho SA (Case C-342/01) [2005] ICR 1040, ECJ
  - art 7(1)(2): Federatie Nederlandse Vakbeweging v Netherlands State (Case C-124/05) [2006] ICR ICR 962, ECJ
- Council Directive 94/33/EC
  - art 11: Addison (trading as Brayton News) v Ashby [2003] ICR 667, EAT
- Council Directive 97/80/EC
  - art 2: Secretary of State for Trade and Industry v Rutherford (No 2) [2005] ICR 119, EAT and CA
- Council Directive 97/81/EC
  - recital (16), Annex, clause 2: Christie v Department for Constitutional Affairs [2007] ICR 1553, EAT
  - Annex, clause 3(2): Matthews v Kent and Medway Towns Fire Authority [2006] ICR 365, HL(E)
  - Annex, clause 4: Wippel v Peek & Cloppenburg GmbH & Co (Case C-313/02) [2005] ICR 1604, ECJ
- Council Directive 98/37/EC
  - art 7: R (Junttan Oy) v Bristol Magistrates' Court [2002] ICR 1523, DC; [2003] ICR 1475, HL(E)
- Council Directive 98/59/EC
  - art 2: GMB v Amicus [2003] ICR 1396, EAT
- Council Directive 2000/43/EC
  - art 7: Vakante v Governing Body of Addey and Stanhope School (No 2) [2004] ICR 279, EAT; [2005] ICR 231, CA
  - art 8: Oyarce v Cheshire County Council [2007] ICR 1693, EAT
- Council Directive 2000/78/EC
  - art 1: Chacón Navas v Eurest Colectividades SA (Case C-13/05) [2007] ICR 1, ECJ
  - arts 1, 2(2): Attridge Law v Coleman [2007] ICR 654, EAT
  - art 4: R (Amicus—MSF Section) v Secretary of State for Trade and Industry (Christian Action Research Education intervening) [2007] ICR 1176

Council Regulation (EEC) No 17/62
- art 14: Roquette Frères SA v Directeur général de la concurrence, de la consommation et de la répression des fraudes [2004] ICR 66, ECJ

Council Regulation (EEC) No 1612/68 (as amended)
- art 7(2): Collins v Secretary of State for Work and Pensions (Case C-138/02) [2005] ICR 37, ECJ
- art 12: Baumbast v Secretary of State for the Home Department (Case C-413/99) [2003] ICR 1347, ECJ

EC Treaty (OJ 1992 c 224, p 6, OJ 1997 c 340, p 3, OJ 2002 c 325, p 33)
- arts 3(g), 5, 85, 86, 90: Brentjens' Handelsonderneming BV v Stichting Bedrijfspensioenfonds voor de Handel in Bouwmaterialen (Cases C-115–117/97) [2001] ICR 774, ECJ
- arts 6, 8, 8a: Grzelczyk v Centre public d'aide sociale Ottignies-Louvain-la-Neuve (Case C-184/99) [2002] ICR 566, ECJ
- art 8a(1) (art 18(1) EC): D'Hoop v Office national de l'emploi (Case C-224/98) [2004] ICR 137, ECJ
- arts 10 EC, 81 EC: Crehan v Inntrepreneur Pub Co (CPC) (Office of Fair Trading intervening) [2006] ICR 1344, HL(E)
- art 18 EC: De Cuyper v Office national de l'emploi (Case C-406/04) [2007] ICR 317, ECJ
- art 18(1) EC: Baumbast v Secretary of State for the Home Department (Case C-413/99) [2003] ICR 1347, ECJ
- art 43 EC (ex art 52): Conseil National de l'Ordre des Architectes v Dreessen (Case C-31/00) [2002] ICR 1227, ECJ
- art 48(2) (after amendment art 39(2) EC): Collins v Secretary of State for Work and Pensions (Case C-138/02) [2005] ICR 37, ECJ
- arts 59, 60: Criminal proceedings against Arblade (Cases C-369 and 376/96) [2001] ICR 434, ECJ
- art 81(1) EC: Volkswagen AG v Commission of the European Communities (Case T-208/01) [2004] ICR 1197, CFI; (Case C-74/04P) [2007] ICR 217, ECJ
- art 85 (art 81 EC): Courage Ltd v Crehan (Case C-453/99) [2002] ICR 457, ECJ
- art 85(1): Bayer AG v Commission of the European Communities (Case T-41/96) [2001] ICR 735, CFI; (Cases C-2/01P and C-3/01P) [2005] ICR 834, ECJ
- art 119: Preston v Wolverhampton Healthcare NHS Trust (No 2) [2001] ICR 217, HL(E)
  - Abdoulaye v Régie Nationale des Usines Renault SA (Case C-218/98) [2001] ICR 527, ECJ
  - Jämställdhetsombudsmannen v Örebro Läns Landsting (C-236/98) [2001] ICR 249, ECJ
  - Quirk v Burton Hospitals NHS Trust [2001] ICR 415, EAT; [2002] ICR 602, CA
  - Alabaster v Woolwich plc (Case C-147/02) [2005] ICR 695, ECJ
  - Alabaster v Barclays Bank plc (formerly Woolwich plc) [2005] ICR 1246, CA
- art 141 EC: Harvest Town Circle Ltd v Rutherford [2002] ICR 123, EAT
  - Abrahamsson v Fogelqvist (Case C-407/98) [2002] ICR 932, ECJ
  - South Ayrshire Council v Morton [2002] ICR 956, Ct of Sess
  - Allonby v Accrington and Rossendale College [2001] ICR 1189, CA
  - Lawrence v Regent Office Care Ltd (Case 320/00) [2003] ICR 1092, ECJ
  - KB v National Health Service Pensions Agency (Case C-117/01) [2004] ICR 781, ECJ
  - Department for Environment Food and Rural Affairs v Robertson [2004] ICR 1289, EAT; [2005] ICR 750, CA
  - Allonby v Accrington and Rossendale College (Case C-256/01) [2004] ICR 1328, ECJ
  - Secretary of State for Trade and Industry v Rutherford (No 2) [2005] ICR 119, EAT and CA; [2006] ICR 785, HL(E)
  - North Western Health Board v McKenna (Case C-191/03) [2006] ICR 477, ECJ
  - Cadman v Health and Safety Executive (Equal Opportunities Commission intervening) (Case C-17/05) [2006] ICR 1623, ECJ
  - Harland & Wolff Pension Trustees Ltd v Aon Consulting Financial Services Ltd [2007] ICR 429

INTERNATIONAL CONVENTIONS JUDICIALLY CONSIDERED

ICR 2001–2007

- Convention for the Protection of Human Rights and Fundamental Freedoms (1953) (Cmd 8969)
  - art 6: In re Medicaments and Related Classes of Goods (No 2) [2001] ICR 564, CA
  - arts 6, 8: Heath v Comr of Police of the Metropolis [2005] ICR 329, CA
    - Connex South Eastern Ltd v Bangs [2005] ICR 763, CA
  - art 6(1): Scanfuture (UK) Ltd v Secretary of State for Trade and Industry [2001] ICR 1096, EAT
  - art 6, First Protocol, art 1: R (Malik) v Waltham Forest Primary Care Trust [2006] ICR 1111
  - art 8: Chairman and Governors of Amwell View School v Dogherty [2007] ICR 135, EAT
  - art 11: R (National Union of Journalists) v Central Arbitration Committee [2005] ICR 493
  - art 12: KB v National Health Service Pensions Agency (Case C-117/01) [2004] ICR 781, ECJ
  - art 14: Macdonald v Ministry of Defence [2001] ICR 1, EAT(Sc)
- Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (1968) (as amended)
  - art 5(1): Weber v Universal Ogden Services Ltd (Case C-37/00) [2002] ICR 979, ECJ
- **EEC–Turkey Association Agreement** (1963)
  - art 2(1): R (Ozturk) v Secretary of State for the Home Department [2006] ICR 178
  - art 6(1): R (Ozturk) v Secretary of State for the Home Department [2006] ICR 1314, CA
    - R (Payir) v Secretary of State for the Home Department [2006] ICR 1314, CA
- **EEC-Turkey Association Agreement** (1963), **Additional Protocol** (1970)
  - art 59: Derin v Landreis Darmstadt-Dieburg (Case C-325/05) [2007] ICR 1706, ECJ

RECENT POINTS INDEX

References are to year/part number

A to B Travel Ltd v Kennedy; 11 October 2006; EAT/341/06 2007/3
ABC News Intercontinental Inc v Gizbert; 21 August 2006; EAT/160/06 2006/12
AEUU v Lyndon Scaffolding plc: 26 January 2001; EAT/1242/99 2001/5
A F Blakemore & Son Ltd v Machin; 2 May 2007; [2007] EWHC 963 (Ch) 2007/8
Abbey National plc v Fairbrother; 12 January 2007; EAT/84/06 2007/5
Abbey National plc v Kaur; 3 August 2005; EAT/271/05 2006/1
Ackinclose v Gateshead Metropolitan Borough Council; 28 October 2004; EAT/87/04 2005/5
Adebayo-Orebote v Sureway Parking Services Ltd: 7 December 2001; EAT/1242/00 2002/5
Airbus UK Ltd v Wilson; 25 April 2006; EAT/61/06 2006/10
Albion Hotel (Freshwater) Ltd v Silva; 15 November 2001; EAT/375/00 2002/1
Anderson v Jarvis Hotels plc; 30 May 2006; EATS/62/05 2006/11
Argyll & Clyde Health Board v Foulds; 25 August 2006; EATS/9/06 2006/11
Armstrong v Devon County Council; 16 January 2002; EAT/484/96 2002/2
Arnold Clark Automobiles Ltd v Stewart; 20 December 2005; EATS/52/05 2006/5
Arora v Rockwell Automation Ltd; 21 April 2006; EAT/97/06 2006/8
Arriva North West & Wales v Colebourn; 18 October 2005; EAT/439/05 2006/3
Aspinall v MSI Mech Forge Ltd; 25 July 2002; EAT/891/01 2002/10
Attrill (decd) v Wightlink Ltd; 4 July 2002; EAT/1003/01 2002/12
Aziz-Mir v Sainsbury's Supermarket plc; 15 December 2006; EAT/537/06 2007/3

BSW Ltd v Brown; 3 May 2005; EAT/835/04 2005/7
BT Fleet Ltd v McKenna: 17 March 2005: [2005] EWHC 387 (Admin) 2005/6
Babula v Waltham Forest College; 17 May 2006; EAT/635/05 2006/10
Baillie v McFarlane; 2 May 2001; EAT/1403/00 2001/6
Baker & Co v Marenah; 11 June 2003; EAT/77/03 2003/11
Balamoody v UKCC for Nursing Midwifery & Home Visitors; 5 December 2000; EAT/774/99 2001/7
Balfour Beatty Power Networks Ltd v Wilcox; 20 July 2006; [2006] EWCA Civ 1240 2006/12
Barber v Humphreys; 17 September 2000; EAT/560/00 2001/2
Barnet London Borough Council v Ferguson; 18 September 2006; EAT/220/06 2007/4
Baron v Bliss Mediation Services; 21 February 2006; EAT/454/05 2006/8
Bax Global Ltd v French; 29 November 2002; EAT/812/01 2003/5
Bax Global Ltd v French; 20 October 2003; EAT/596/03 2004/2
Beat v Devon County Council; 6 December 2005; EAT/534/05 2006/4
Beauvale Furnishings Ltd v Chapman; 29 November 2000; EAT/79/00 2001/1
Beazer Investments Ltd v Soares; 26 March 2004; [2004] EWCA Civ 482 2004/6
Benchmark Dental Laboratories Group Ltd v Perfitt; 2 November 2004; EAT/304/04 2005/4
Benjamin v Interlacing Ribbon Ltd; 1 November 2005; EAT/363 & 420/05 2006/3
Bennett v Southwark London Borough Council; 26 January 2001; EAT/1273/97 2001/5
Best v St Austell China Clay Museum Ltd; 11 June 2004; EAT/924/03 2004/12
Berry v GB Electronics Ltd; 17 Octboer 2001; EAT/882/00 2002/1
Blue Diamond Services Ltd v McNeish; 20 May 2003; EAT/1354/01 2003/12
Bolch v Chipman; 19 May 2003; EAT/1149 & 1150/02 2003/12
Boulding v Land Securities Trillium (Media Services) Ltd; 3 May 2006; EAT/23/06 2006/10
Bradford City Metropolitan District Council v Pratt; 9 January 2007; EAT/391/06 2007/5
Brain v Corby Borough Council; 10 November 2004; EAT/376/04 2005/5
Bray v Camden London Borough Council; 23 July 2002; EAT/1162/01 2002/13
Brennan v Bedford Borough Council; 30 June 2003; EAT/317/03 2003/12
Bright v Harrow & Hilllingdon Healthcare NHS Trust; 26 July 2001; EAT/115/01 2001/10
British Bakeries Ltd v O'Brien; 26 April 2002; EAT/1479/00 2002/9
British Medical Association v Chaudhary; 27 July 2007; [2007] EWCA Civ 788 2007/11
British Nursing Association v Inland Revenue; 8 June 2001; EAT/1387/00 2001/11
Brookes v South Yorkshire Passenger Transport Executive; 28 April 2005 2005/8
Bruce Anchor (Scotland) Ltd v Turbet; 12 September 2001; EAT/455/01 2001/10
Bryant (t/a Bryant Hamilton & Co) v Weir; 21 July 2004; EAT/253/04 2004/14
Burton v Frances Higham (t/a Ace Appointments); 14 February 2003; EAT/609/02 2003/6

Callaghan v Glasgow City Council; 11 September 2001; EAT/43/01 2002/2
Calor Gas Ltd v Bray; 12 September 2005; EAT/633/04 2006/2
Camden Primary Care Trust v Atchoe; 9 May 2007; [2007] EWCA Civ 714 2007/12

Cape Industrial Services Ltd v Ambler; 20 December 2002; EAT/950/01 .... 2003/6
Cardinal Newman Roman Catholic School (Governing Body of) v Reid; 18 March 2004; EAT/13/04 .... 2004/10
Care First Health Care Ltd v McLaren; 21 June 2004; EAT/982/03 .... 2004/10
Caredda v London Goodenough Trust for Overseas Graduates; 16 January 2002; EAT/843/00 2002/5
Carlisle City Council v Bulman; 2 December 2002; EAT/1120/01 .... 2003/1
Carter v Tower Hamlets London Borough Council; 22 June 2001; EAT/1073/99 .... 2001/11
Catton v Hudson Shribman; 10 October 2002; EAT/111/01 .... 2002/14
Cerinus v Bell College of Technology; 3 October 2001; EAT/218/01 .... 2001/10
Cex Ltd v Lewis; 10 August 2007; EAT/13/07 .... 2007/11
Chadwick v Bayer plc; 14 June 2002; EAT/1110/01 .... 2002/12
Charnos plc v Donnelly; 27 July 2000; EAT/334/00 .... 2001/1
Chief Constable of the Kent Constabulary v Kufeji; 4 May 2001; EAT/1135/00 .... 2001/9
Chohan v Derby Law Centre; 7 April 2004; EAT/851/03 .... 2004/7
Chronos Richardson Ltd v Watson; 27 March 2001; EAT/1340/99 .... 2001/5
Clarke v Arriva Kent Thameside Ltd; 25 July 2001; EAT/341/00 .... 2001/10
Coca-Cola Enterprises Ltd v Shergill; 2 September 2002; EAT/3/02 .... 2002/14
Codemasters Software Co Ltd v Wong; 14 December 2006; EAT/639/06 .... 2007/5
Coldridge v Prison Service; 20 April 2005; EAT/729/04 .... 2005/7
Collins v Secretary of State for Trade and Industry; 31 January 2001; EAT/1460/99 .... 2001/6
Colvin v Attol Business Systems Ltd; 29 November 2002; EAT/880/02 .... 2003/4
Commission of the European Communities v Federal Republic of Germany (Case C-490/04); 18 July 2007 .... 2007/9
Comr of Police of the Metropolis v Reilly; 22 March 2002; EAT/115/02 .... 2002/10
Conoco Ltd v Booth; 30 January 2001; EAT/83/00 .... 2001/4
Cosgrove v Caesar & Howie; 6 June 2001; EAT/1432/00 .... 2001/7
Coutts & Co plc v Cure; 17 September 2004; EAT/395/04 .... 2005/6
Cranwick Country Food plc v GMB; 6 September 2005; EAT/225/05 .... 2006/1
Curr v Marks & Spencer plc; 6 March 2002; EAT/1284/00 .... 2002/5
Customs and Excise Comrs v Jayawardane; 2 December 2002; EAT/1092/01 .... 2003/4

D36 Ltd v Castro; 16 July 2004; EAT/853/03 .... 2004/12
Daniels v Comr of Police of the Metropolis; 5 July 2006; [2006] EWHC 1622 (QB) 2006/12
David Webster Ltd v Holohan; 26 February 2002; PA/857/01 .... 2002/11
Davies v M J Wyatt (Decorators) Ltd; 13 July 2000; EAT/1262/99 .... 2001/3
Davoren v London Fire Protection Services; 31 January 2002; EAT/1433/00 .... 2002/6
Deman v University of Bradford; 1 June 2006; EAT/80/06 .... 2006/8
Department for Constitutional Affairs (formerly North Wales Magistrates' Courts Committee) v Jones; 24 November 2006; EAT/333/06 .... 2007/1
Department of Health v Bird; 17 July 2001; EAT/668/01 .... 2001/9
Department of Work and Pensions v Hall; 31 August 2005; EAT/12/05 .... 2006/2
Devoy v World Duty Free (Europe) Ltd; 27 November 2000; EAT/59/00 .... 2001/2
Direct Line Accident Management Ltd v Zaidi; 25 September 2001; EAT/384/00 .... 2002/2
Dispatch Management Services (UK) Ltd v Douglas; 4 December 2001; EAT/902/01 .... 2002/7
Dolby Hotel Liverpool Ltd v Farley; 30 October 2002; EAT/1140/01 .... 2003/3
Donovan v Centrepoint Soho; 17 October 2002; EAT/1172/01 .... 2003/2
Draper v Mears Ltd; 5 September 2006; EAT/174/06 .... 2007/1
Dressel v Partnership Housing Ltd; 19 March 2003; EATS/48/02 .... 2003/8
Driver v Preston Borough Council; 11 June 2002; PA/1090/01 .... 2002/11
Dundee City Council v Robertson; 7 November 2001; EAT/595/01 .... 2002/2
Dundee City Council v Selbie; 3 May 2002; EAT/1060/01 .... 2002/8

EB v BA; 22 February 2006; [2006] EWCA Civ 132 .... 2006/8
East Lancashire Coachbuilders v Hilton; 24 August 2006; EAT/54/06 .... 2006/12
Ece v Newham London Borough Council; 22 February 2002; EAT/1035/00 .... 2002/9
Edmondson v BMI Healthcare; 26 November 2002; EAT/654/01 .... 2003/2
Elkouil v Coney Island Ltd; 30 October 2001; EAT/520/00 .... 2002/1
Ellison v Petrie Tucker & Partners Ltd; 19 July 2002; EAT/795/01 .... 2002/13
Emerging Markets Partnership (Europe) Ltd v Bachnak; [2003] EWCA Civ 1876 .... 2004/4
Ennever v Metropolitan Police; 7 March 2006; EAT/51/06 .... 2006/5
Environment Plus (UK) Ltd v Parton; 11 November 2004; EAT/458/04 .... 2005/5
Evans v The Malley Organisation Ltd (t/a First Business Support) 19 February 2002; EAT/99/01 2002/6

Fasuyi v Greenwich London Borough Council; 20 October 2000; EAT/1078/99 .... 2001/4
Fife Council v McPhee; 27 February 2001; EAT/750/00 .... 2001/4
First Hampshire & Dorset Ltd v Feist; 20 December 2006; EAT/510/06 .... 2007/3

Fitzgerald v University of Kent at Canterbury; 13 May 2003; EAT/474/02 2003/9
orbuoys Ltd v Rich; 19 April 2002; EAT/144/01 2002/8
owler v Southend on Sea Borough Council; 23 April 2001; EAT/1021/98 2001/9
ox v Betesh Fox & Co Solicitors; 7 October 2002; EAT/363/01 2003/1
ox v Willis Howells Financial Services; 1 March 2001; EAT/53/00 2001/9
uller v Mastercare Service & Distribution; 24 September 2001; EAT/707/00 2002/2

GMB v Hamm; 15 November 2000; EAT/246/00 2001/1
Gee v Shell UK Ltd; 24 October 2002; [2002] EWCA Civ 1479 2002/12
Gardiner v VAW Motorcast; 18 July 2001; EAT/262/00 2001/10
Gee v Shell UK Ltd; 14 January 2002; EAT/484/00 2002/4
Giannelli v Edmund Bell & Co Ltd; 6 September 2005; EAT/192/05 2006/2
Gibbs (trading as Jarlands Financial Services) v Harris; 27 February 2007; EAT/23/07 2007/5
Gilbert v Barnsley Metropolitan Borough Council; 12 April 2002; EAT/674/00 2002/9
Gill v Ford Motor Co Ltd; Wong v BAE Systems Operations Ltd; 16 July 2004; EAT/5/04, EAT/1006/03 2004/12
Gill v Whitbreads plc; 28 February 2001; EAT/1444/99 2001/8
Gooden v Ritz Country 1035 Ltd; 31 January 2002; EAT/1469/00 2002/6
Gould v Governors of Haileybury & Imperial Service College; 19 July 2002; EAT/635 & 1191/00 2002/13
Grant v In 2 Focus Sales Development Services Ltd; 30 January 2007; EAT/310/06 2007/4
Green v Robins & Day Ltd (trading as Warwick Wright Clapham); 22 May 2002; EAT/83/01 2002/10
Greenhof v Barnsley Metropolitan Borough Council; 5 August 2005; EAT/286/05 2006/1
Grossman v Barnet Healthcare; 22 February 2002; EAT/134/01 2002/7
Gyaniao v Design Corner Ltd; 15 June 2001; EAT/204/01 2001/11

HSBC Bank plc v Clarkson; 29 October 2002; EAT/205/01 2002/14
Hackney London Borough Council v Adams; 6 February 2003; EAT/1318/01 2003/5
Hackney London Borough Council v Joseph; 4 July 2002; EAT/1260/01 2002/14
Hamilton v Tandberg Television Ltd; 12 December 2002; EAT/65/02 2003/3
Hardman v Mallon (trading as Orchard Lodge Nursing Home); 25 March 2002; EAT/360/01 2002/7
Hartmann v Freistaat Bayern (Case C-212/05); 18 July 2007 2007/9
Haydock v G D Cocker & Sons Ltd; 18 December 2002; EAT/215/02 2003/6
Hayes v Charman Underwriting Agencies Ltd; 19 December 2001; EAT/242/00 2002/3
Health Development Agency v Parish; 24 October 2003; EAT/543/03 2004/4
Heath v Comr of Police of the Metropolis; 12 May 2003; EAT/454/02 2003/9
Henderson v Northern Leisure plc; 17 January 2001; EAT/70/00 2001/4
Hendrickson Europe Ltd v Pipe; 15 April 2003; EAT/272/02 2003/8
Highdorn Co Ltd v Saleh; 16 August 2002; EAT/80/02 2002/11
Hill v Chapell; 20 March 2002; EAT/1250/01 2002/6
Hillcrest Care Ltd v Morrison; 21 July 2004; EAT/299/04 2004/14
Hillingdon London Borough Council v Thomas; 26 September 2002; EAT/1317/01 2003/2
Hilton v Shiner Ltd; 24 May 2001; EAT/9/00 2001/7
Hodes v Marks & Spencer plc: 1 November 2001; EAT/716/00 2002/1
Hosie v North Ayrshire Leisure Ltd; 2 October 2003; EATS/13/03 2004/1
Hudson v Testway Housing Ltd; 9 March 2004; EAT/825 & 826/03 2004/6
Hudson v University of Oxford; 27 February 2007; [2007] EWCA Civ 336 2007/7
Hughes v Governing Body of Archers Court School; 14 January 2003; EAT/1444/01 2003/11
Hussain v Addaction; 23 October 2001; EAT/755/00 2002/3
Hutton v A E Proctor Ltd; 18 December 2000; EAT/1319/99 2001/3
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RECENT POINTS

Points of interest in the Employment Appeal Tribunal not calling for a full report in ICR

[2001] ICR Part 1

BREACH OF CONTRACT

Employees brought claims for breach of contract in relation to their employers' refusal to pay discretionary bonuses which had been decided on by the employers but which were withheld after the employees gave notice to terminate their employment. An employment tribunal upheld the claims on the ground that, the employers having exercised their discretion in the employees' favour, it had been unreasonable to change their mind and in breach of the implied term not to carry out an act calculated to undermine trust and confidence between employer and employee.

JUDGE PETER CLARK, allowing an appeal by the employers and remitting the matter for rehearing, said that in *Clark v Nomura International Plc* (unreported) 6 September 2000, Burton J had recognised that an employer's discretion to pay a bonus was not unfettered. The decision not to pay must not be capricious. Burton J had approached the matter on the footing that an employer could not exercise his discretion, by refusing to pay a bonus, perversely in the *Wednesbury* sense. That was not to say that such an employer acted unreasonably but that no reasonable employer would have reached the same conclusion acting in accordance with his contractual obligations. The employment tribunal had approached the implied term on the basis that a reasonable employer would not have withheld the bonuses, which had been determined but not declared to the employees, on the ground that they were shortly to leave the employers' employment. That was an impermissible approach. The discretion vested in the employers had to be exercised in good faith and not capriciously. The question of whether the employers acted in breach of the implied term was a decision for the fact-finding tribunal once all the necessary primary facts had been found.

Manor House Healthcare v Hayes; 16 October 2000; EAT/1196/99
EAT: Judge Peter Clark, Mr P Dawson and Mrs A Gallico

DISABILITY DISCRIMINATION

The applicant, who had a history of mental illness, had his application to become a trainee voluntary adviser with a citizens' advice bureau rejected. On his complaint of disability discrimination under section 4(1)(a) of the Disability Discrimination Act 1995, an employment tribunal found that it had no jurisdiction to hear the complaint, because the applicant had not applied for "employment" as defined by section 68 of the Act, since the volunteer adviser post and the training programme did not fall within that definition.

JUDGE WILKIE QC, allowing an appeal by the applicant, said that any tribunal, looking at the document the applicant would have been required to sign and concluding that there was no obligation on either party, must have either misdirected itself as to the law or completely failed to understand the document. Further, by apparently regarding the absence of pay as the crucial factor, rather than one of a number of factors to be weighed in the balance, the tribunal erred in law. In saying that expenses could not equate to pay or remunerated employment, while no doubt accurately categorising expenses as opposed to payment and remuneration, the tribunal, in so far as it was seeking to rely on that as supporting a conclusion that it was not a contractual agreement with mutually binding obligations, was again misdirecting itself. But the mere fact that the document amounted to a legal binding contract if entered into did not in itself mean that the tribunal had jurisdiction, because the contract had to be either a contract of service or a contract personally to do any work. The tribunal had not addressed the question whether it was such a contract or was no more than a contract simply to undergo training in the manner prescribed. To come to a conclusion on that issue, the tribunal would have to receive evidence of what happened under such an agreement in terms of the mix between formal training, supervision and work performed during the training period. Accordingly, the matter would have to be remitted. Should the employment tribunal conclude that the agreement was a contract for training rather than a contract within section 68, the applicant would seek to argue that the refusal of the applicant's application was contrary to section 4(1)(a) of the 1995 Act, in that admission to the training programme was part of the "arrangements which [the citizens' advice bureau] makes for the purpose of determining to whom [it] should offer employment". The words of section 4(1)(a) were wide, and, if arrangements were to determine to whom employment generally should be offered, such a training programme was capable of being covered by the subsection. The satisfactory completion of the programme was a first stage in a potentially seamless process at the end of which was an offer of employment as a voluntary adviser. Whether that was the case would depend on the evidence.

Murray v Newham Citizens' Advice Bureau; 6 July 2000; EAT/1096/99
EAT: Judge Wilkie QC, Mr J R Crosby and Miss G Mills

EMPLOYEE

The applicant responded to an advertisement to work with M Ltd and worked at its plant, subject to its control, until M Ltd suspended the applicant and then "decided to terminate his assignment". On the applicant's complaint of unfair dismissal, M Ltd submitted that the applicant was an employee of MC Ltd and a "temporary worker" for M Ltd under a contract for services. MC Ltd carried on business in the nature of an employment agency, and supplied selected individuals to M Ltd pursuant to an "operating agreement for the supply of temporary workers" which required it to conduct a recruitment process specified by M Ltd. The employment tribunal decided, as a preliminary issue, that the applicant was an employee of M Ltd.

LINDSAY J, dismissing an appeal by M Ltd, said that, since M Ltd had limited its argument on appeal to the second component of a contract of service, namely control, the principal question was whether the employment tribunal erred in law in concluding that as between M Ltd and the applicant there existed the right of the former to control the latter to a degree sufficient to enable the tribunal properly to regard M Ltd as the employer and the applicant as its employee. Reference was made to dicta of MacKenna J in *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1968] 2 QB 497, 515. Although MacKenna J spoke of control in terms of *rights*, there was no good reason to ignore practical aspects of control that fell short of direct legal rights. The employment tribunal had held that the control of what the applicant did on a day to day business lay with M Ltd. It would be unreal to ignore the existence of that practical degree of control simply because a direct legal right did not lie in M Ltd under a contract it had made with the applicant. It did not necessarily disprove A's control to a given degree by proving that B had similar or greater powers of control. The sanctions available against the applicant were so akin to the sanction an employer would have against an employee that one could not say that the control exercisable by M Ltd was not "in a sufficient degree to make one party the master and the other his servant". There was no error of law in the employment tribunal decision.

Motorola Ltd v Davidson; 18 May 2000; EAT/46/00
EAT(Sc): Lindsay J, Mr A J Ramsden and Mrs T Marsland

EVIDENCE

During the hearing of complaints by two employees that they had been unfairly dismissed on the ground of misconduct pursuant to statements made by fellow employees given on the basis that the makers would remain anonymous, the employment tribunal refused to disallow a question to be put to an employer's witness as to the possible identity of one of the statement makers. The tribunal also indicated that it was prepared to compel the production of documents understood to be the statements in question.

LORD JOHNSTON, allowing an appeal by the employer, said that the issue created a clash of two irreconcilable principles: on the one hand, the need for there to be a full and fair investigation of the case on both sides, and, on the other hand, the legitimate attempt by the employer to honour a pledge given to employees who had given statements in confidence. From *Science Research Council v Nasse* [1979] ICR 921 it had to be taken that there was no absolute in either respect. That case would seem to suggest that, if possible, compromises should first be attempted. *Hussain v Elonex Plc* [1999] IRLR 420 pointed to the fundamental need in terms of natural justice for the employee to know the case he faced and, if that could not be done without handing over confidential documents, that must be done. It did not follow, however, that such was necessary if by other means the employee was aware of the case against him. In the present case the tribunal had reached its decisions on the basis that to do otherwise was to delegate or abandon the judicial duty to investigate the matter, in deference to a decision of the employer. Whether an attempt had been made to consider whether parts of the statements should be deleted was not entirely clear, but the appeal tribunal had been told that it was not practicable to do so without destroying the substance of the statements. Accordingly, a compromise, which should if at all possible be effected, did not appear to be possible. The tribunal had misdirected itself by determining the matter solely on the question of abrogation or abandonment of the judicial role. Where, in a case such as the present, an employer had given adequate notice to employees of the case against them by other means, it was legitimate for the employer to honour a pledge of anonymity if a compromise was not possible. The result might be that the best evidence was not led, but no doubt the tribunal would take that into account in considering how far the employer had succeeded in discharging the onus of establishing the reason for dismissal and the adequacy of the investigation into that reason.

Charnos Plc v Donnelly; 27 July 2000; EAT/334/00
EAT(Sc): Lord Johnston, Mr A J Ramsden and Mr R P Thomson

ILLEGALITY

From 1996 until June 1997 the applicant, at his own request, worked ostensibly as a consultant, presenting invoices and receiving his salary gross and paying national insurance contributions as a self-employed person, while in fact working as an employee. From July 1997 until his dismissal in December 1998 he was paid with deductions made at source. On his complaint of unfair dismissal, the employment tribunal found, as a preliminary point, that the documents did not show that tax and insurance contributions had been avoided; that the contract of employment was not tainted with illegality; and that the applicant was entitled to rely on the period before July 1997 in computing his period of continuous employment, in order to pursue his complaint.

JUDGE REID QC, allowing an appeal by the employers, said that payment of wages free of tax did not necessarily render a contract of employment illegal and void, but the manner of performance, for example, the production of false documents, might do so. Whether an employee was affected by such illegality would depend on the state of his knowledge. On the face of the documents before the employment tribunal, contrary to the finding of that tribunal, the applicant had not conducted his tax affairs properly. The documents disclosed that he had failed to make tax returns and had paid tax on the basis not of his earnings but of a much lower income. It was also apparent that he paid far less by way of national insurance contributions than he should have done on the basis of his earnings as an employed person. The tribunal's findings were unsustainable. The material before the appeal tribunal was consistent only with an intention to defraud the revenue by purporting to be self-employed when he was in fact employed. There was no evidence that he had ever paid the tax he should have done. The tribunal's decision must be discharged, but, since there might have been material not rehearsed in the tribunal's summary reasons which had influenced their decision, the case would be remitted for rehearing.

Beauvale Furnishings Ltd v Chapman; 29 November 2000; EAT/79/00
EAT: Judge Reid QC, Mr B Fitzgerald and Ms G Mills

TIME LIMIT

A complaint that the applicant had been unlawfully expelled from his union, contrary to section 174(1) of the Trade Union and Labour Relations (Consolidation) Act 1992, was presented to an employment tribunal more than six months after his expulsion. The tribunal held that he was entitled to pursue his claim on the ground that, for the purposes of section 175, it was "not reasonably practicable" for him to have presented the complaint in time when he had been pursuing an internal appeal in accordance with the union's procedures pursuant to advice given him by a citizens' advice bureau.

SIR CHRISTOPHER BELLAMY QC, allowing an appeal by the union and dismissing the complaint, said that the words "not reasonably practicable" were, in principle, to be given the same meaning whenever they appeared in an equivalent context in comparable legislation. The wording of section 175(b) of the 1992 Act was the same as section 111(2)(b) of the Employment Rights Act 1996, which dealt with the time limit in cases of unfair dismissal. That section was itself worded identically to its predecessor sections. Parliament could have, but had not, chosen to adopt different words as it did when adopting the wider test provided under section 68(6) of the Race Relations Act 1976, which provided that a complaint presented out of time might none the less be considered by a tribunal if it considered that it was "just and equitable" to do so. Moreover, Parliament must be presumed to have known, when enacting the 1992 Act, of the meaning given to the words "not reasonably practicable" by previous decisions of the courts. It followed that the employment tribunal had given insufficient weight to previous decisions concerning the interpretation of those words in the context of time limits under other statutes. The Employment Appeal Tribunal had held in *Bodha v Hampshire Area Health Authority* [1982] ICR 200, 205 that the fact that an employer's internal appeal procedure had not been exhausted did not render it "not reasonably practicable" to present a complaint within the time limit. As regards the tribunal's reliance on "inaccurate advice" the applicant was said to have obtained from the citizens' advice bureau, the fact that an applicant received incorrect advice from a citizens' advice bureau or other adviser did not in law justify the conclusion that it was "not reasonably practicable" to present a complaint within the relevant time limit.

GMB v Hamm; 15 November 2000; EAT/246/00
EAT: Sir Christopher Bellamy QC, Mr J R Crosby and Mr G H Wright

CONSTRUCTIVE DISMISSAL

An employee, who went on sick leave suffering from anxiety and depression following a decision to demote her, resigned after her employers insisted that her appeal against the demotion would not be heard until she was fit to return to work. An employment tribunal rejected her claim that she had been constructively dismissed on the ground that it was a reasonable response by the employers to delay the appeal until she was fit and they were not in breach of the implied term of mutual trust and confidence.

BELL J, allowing an appeal by the employee, said that for there to be a constructive dismissal the delay in the appeal process, which was the sole reason for the employee's resignation, had to be a significant breach of contract entitling her to treat herself as discharged from her contract of employment. The test of breach of the implied term was whether the employer had acted in a manner calculated or likely to destroy or undermine the relationship of trust and confidence. While that test was contractual, the question of whether the employer had acted reasonably was not wholly irrelevant. It might be of evidential value in deciding whether there had been a breach of the implied term by the employer and whether any breach was sufficiently serious to entitle the employee to consider herself as discharged. The tribunal had thought it useful to ask itself whether the employers had acted reasonably, when judging whether the delay put the employers in breach of the implied term and to such a degree as to justify resignation. It was entitled to take that approach and to decide that the employers acted reasonably and were not in breach of the implied term. However, the employee's case was that the employers' delay in hearing her appeal was a significant breach of an express term of her contract, which provided that appeals had to be heard as soon as was "practicable". The word "practicable" was not to be taken to mean simply "capable of being done". Adopting what was said by May LJ in *Palmer v Southend-on-Sea Borough Council* [1984] ICR 372, 384H, and reading "practicable" as the equivalent "feasible" was a good working approach to its meaning and application. The tribunal had misdirected itself in asking whether the employers had acted reasonably in not hearing the appeal by the time the employee resigned, though that might have been because of confusion as to the applicability of the express term. The matter would be remitted to the same tribunal to decide whether the employers were in breach of the express term and, if so, whether the nature of the breach was sufficiently serious to amount to constructive dismissal.

Devoy v World Duty Free (Europe) Ltd; 27 November 2000; EAT/59/00
EAT: Bell J, Mr D J Hodgkins and Mr H Singh

COSTS

An employment tribunal made an order, under rule 12(3)(c) of the Employment Tribunals Rules of Procedure 1993, for the applicant to pay the costs incurred by the respondent in respect of the preparation and conduct of the full merits hearing of his complaint without making an inquiry as to his means.

JUDGE WILSON, dismissing an appeal by the applicant, said that in *Benyon v Scadden* [1999] IRLR 700 the appeal tribunal had held, contrary to the view expressed in *Omar v Worldwide News Inc* [1998] IRLR 29, that there was no requirement for a tribunal to look at an applicant's personal means before making an order for costs against him. Indeed, the appeal tribunal in *Benyon* was unable to agree with the decision in *Omar* that only in exceptional circumstances should a tribunal consider the means of a party's trade union in making an order for costs. That would place an unjustified fetter on the tribunal's discretion to award costs, given the unrestricted terms in which the discretion was conferred by the Rules. It was preferable to follow the *Benyon* line because the *Omar* facts were not present and because, when dealing with the matter, the chairman of the employment tribunal had said that it was submitted that, with one or two minor exceptions, the applicant's complaints were completely misconceived and that the applicant's representative had received in excess of 10 warnings as to his conduct of the applicant's case. The applicant had been present at the hearing and his representative was to be taken to have had the applicant's authority in the way he conducted the proceedings.

Lilburne-Byford v Essex County Council; 13 November 2000; EAT/264/98
EAT: Judge H Wilson, Mr J R Crosby and Mr N D Willis

DISCOVERY

An applicant's request for further and better particulars of the notice of appearance was refused by an employment tribunal chairman on the ground that the respondent's case was sufficiently well pleaded. Further requests by the applicant for documents were also refused on the ground that they were not necessary to dispose of the issue between the parties.

JUDGE WILKIE QC, dismissing an appeal by the applicant, said that the applicant contended that, while the tribunal chairman had acted within the powers of her discretion, the review of such discretion by the appellate court was unfettered, and he referred to *British Library v Palyza* [1984] IRLR 306, para 4. On the face of it, the case was authority on the basis of which it could be argued that, at appellate level, the appeal tribunal was free to open issues of discovery and the request for further particulars as if taking the decision afresh. The appeal tribunal had, however, been persuaded by the respondent's review of the relevant authorities that it did not have a free hand to review the decision of the chairman in respect of either matter and was constrained to interfere only on the grounds set out, respectively, in *Bastick v James Lane (Turf Accountants) Ltd* [1979] ICR 778, 782 and *Noorani v Merseyside TEC Ltd* [1999] IRLR 185, para 32. As to the principles on which the question of discovery, particularly in discrimination cases, was concerned, the test was that the tribunal was satisfied that it was necessary to order certain documents to be disclosed and inspected in order fairly to dispose of the proceedings. The chairman's approach had been correct in law and the specific decisions she made were such as a reasonable tribunal, properly directing itself, could have made.

Barber v Humphreys; 27 September 2000; EAT/560/00
EAT: Judge Wilkie QC, Mr D J Hodgkins and Ms B Switzer

SOVEREIGN IMMUNITY

On a complaint of unfair dismissal by an employee of a sovereign state, who worked at its embassy as a driver/interpreter, the employment tribunal decided that the respondent government was not immune from suit and found that the employee had been unfairly dismissed.

JUDGE PETER CLARK, allowing an appeal by the respondent government and dismissing the complaint, said that it was common ground that the question for the tribunal was whether the applicant employee had been a member of "the administrative and technical staff" of the mission within article 1(f) of the Vienna Convention on Diplomatic Relations (1961), set out in Schedule 1 to the Diplomatic Privileges Act 1964, for the purposes of section 16 of the State Immunity Act 1978. It was unfortunate that although the employment tribunal had been referred to *Ahmed v Government of the Kingdom of Saudi Arabia* [1996] ICR 25 it had not been referred to the preceding case of *Arab Republic of Egypt v Gamal-Eldin* [1996] ICR 13. In *Gamal-Eldin* the Employment Appeal Tribunal, at p 23E, had held that although the applicants, who were employed as drivers, formed part of the administrative and technical staff of the mission. There was no factual distinction from the present case. The employment tribunal had given no reasons to explain why they had concluded that the applicant was not a member of the administrative and technical staff on the facts as found. That was an error of law. As it was abundantly clear that such staff included a driver employed to transport nationals of the respondent state arriving by air and to act as their translator, the appropriate course was hold that the respondent had immunity from suit and to dismiss the applicant's complaint.

Government of the Kingdom of Saudi Arabia v Nasser; 26 July 2000; EAT/672/99
EAT: Judge Peter Clark, Mr P Dawson and Mrs R A Vickers

STAY OF PROCEEDINGS

An employee who claimed to have contracted repetitive strain injury and carpal tunnel syndrome as a result of his work brought a complaint, in August 1998, of disability discrimination alleging that his employer had failed to make reasonable adjustments as required by section 6 of the Disability Discrimination Act 1995. In July 1999 the proceedings were stayed pending the issue of High Court proceedings by the employee claiming damages for personal injury. In April 2000 the tribunal called a directions hearing and the complaint was listed for hearing in September 2000. The following month the employee issued proceedings in the High Court and sought a stay of the tribunal proceedings to which the employers consented. The tribunal chairman refused a stay on the ground that it was not in the interests of justice that the complaint should be further delayed.

JUDGE PETER CLARK, allowing an appeal by the employee and substituting an order staying the tribunal proceedings, said that the appeal was supported by the employers who submitted that the employee's two claims arose out of the same facts. The appeal tribunal had no general power of review of employment tribunal interlocutory orders and could only interfere where an error of law was made out. In practice that meant an appellant had to pass the *Wednesbury* test. It was submitted, first, that, although the tribunal was entitled, indeed obliged in the interests of the proper administration of justice, to consider the question of delay in disposing of proceedings, the chairman had, on the face of his reasons, failed to take into account a relevant factor, namely, that the respondent employers had consented to a stay: see *First Castle Electronics Ltd v West* [1989] ICR 72, 77E. There was, it was submitted, no prejudice to the parties by the delay when both agreed that it was appropriate that the High Court proceedings should be heard first. Secondly, it was submitted that the chairman had misunderstood the potential embarrassment to the High Court judge hearing the personal injury action if material findings of fact, binding on him under the issue estoppel principle, were made by the employment tribunal. In the judgment of the appeal tribunal, both submissions were made good, and the chairman's decision was flawed as a matter of law.

Tahir v Cyberlife Technology Ltd; 27 July 2000; EAT/871/00
EAT: Judge Peter Clark, Lord Davies of Coity and Mrs D M Palmer

UNFAIR DISMISSAL

An employment tribunal dismissed an employee's complaint that he had been unfairly dismissed for alleging that his employers had infringed a statutory right, within the meaning of section 104(1)(b) of the Employment Rights Act 1996, because he was dismissed after he had made a complaint under the employers' internal grievance procedure that his manager had refused to allow him time off for public duties contrary to section 50(2) of the Act.

BELL J, dismissing an appeal by the employee, said that the tribunal found that the reason for the employee's dismissal was his carrying out of various activities on a day's sick leave. It was common ground that the employee's use of the grievance procedure to challenge his manager's refusal to allow him more time off for his public duties amounted to an allegation that the employers had infringed a right of his which was a relevant statutory right for the purpose of section 104(1)(b). It was not contended that attending to public duties while on sick leave could amount to the assertion of a statutory right. The statutory scheme relating to unfair dismissal in Part X of the 1996 Act was different to that of race and sex discrimination and victimisation. The tribunal had to focus on "the reason" for dismissal and not the "but for" test applied in discrimination cases. The wording of section 104(1) was plain and it was difficult to do more than rehearse its express terms. It was argued that *King v Great Britain-China Centre* [1992] ICR 516 laid down an approach to the evidence in cases such as the present and that the tribunal should not say: "There is no direct evidence; that is the end of it." The appeal tribunal could not accept that submission. The guidance in that case was clearly useful in discrimination cases. But there were real differences between cases of alleged race discrimination where the complainant might be able to prove that he had been treated "less favourably" but had difficulty showing that that treatment was on racial grounds and the relatively simple question of the reason for dismissal. It was clearly common sense for the employment tribunal to examine the reason given by the employers for the employee's dismissal. The tribunal had clearly done so and considered whether it should draw the inference from the facts that the employee's assertion of his statutory right led to his dismissal. It did not infer that that was the reason, or principal reason, for the dismissal, and, given the fact that after the employee had made his complaint about time off he had compromised his grievance in agreed terms, it was entitled to come to the view it did.

Pennington v Legal Aid Board; 11 December 2000; EAT/1047/99
EAT: Bell J, Mr B Gibbs and Mr A E R Manners

UNFAIR DISMISSAL

Following an assault by a neighbour in January 1997, an employee went on sick leave. At a review hearing in December 1997 it was confirmed that she was suffering from clinical depression. She was dismissed on the grounds of her length of absence and that no time scale as to her recovery had been given. At an internal appeal the employee provided medical evidence stating that she would be fit to resume work on 30 May 1998, but the appeal hearing declined to take notice of it and confirmed her dismissal. An employment tribunal dismissed her complaint of unfair dismissal, finding that she had been fairly dismissed by reason of capability.

KEENE J, allowing an appeal by the employee, said that, on the face of it, the medical evidence was clearly relevant to the issues being considered on the internal appeal. The employment tribunal had regarded its exclusion as justified, and indeed required, by the employer's guidelines on appeals against dismissal. The appeal tribunal was of the view that those guidelines did not exclude new evidence, whether the label attached to the process was one of appeal or review. But, in any event, the normal principle was that new evidence was admissible in such internal appeals, and that must inform the construction of the guidelines. Generally, at an appeal hearing the employer would be expected to take account of anything relevant to the decision to dismiss. Putting it at its very lowest, it would take clear language in the written disciplinary procedures of an employer to justify shutting one's eyes to such further information, and it was doubtful whether even the language of such procedures could justify such an approach. Relevant new information coming into the possession of an employer on the topic of reasonableness before the appeal or review decision had been arrived at should generally be taken into account. To do otherwise would seem to fall outside the range of responses of a reasonable employer. The employment tribunal had fallen into error in misconstruing the guidelines and concluding that the appeal panel had been right to exclude the medical evidence, which was highly material to its decision, from its consideration.

Valton v Hackney London Borough Council; 14 July 2000; EAT/410/99
EAT: Keene J, Mrs A Gallico and Ms G Mills

[2001] ICR Part 3

CONTRACT OF EMPLOYMENT

An employment tribunal found that an employee's complaint that she had not been provided with a written statement of particulars of employment, in compliance with section 1 of the Employment Rights Act 1996, was well-founded, but went on to say that as her employment had terminated the tribunal made no determination in that respect.

JUDGE WILCOX, allowing an appeal by the employee, said that no formal contract of employment setting out the material terms and conditions was given to the employee in the requisite time, and after working for the employer for 12 weeks she was given one week's notice, but the employment tribunal rejected her complaint that she was dismissed for asking for her contract. There was, however, an absolute right under the statute to the terms of the contract. They had not been provided and the tribunal ought to have directed that they should be provided or found terms, certainly as to notice. The matter would be remitted to the same tribunal to consider what the contract was.

Young v Timbmet Ltd; 13 July 2000; EAT/667/99
EAT: Judge David Wilcox, Mr D J Jenkins and Mr K M Young

COSTS

An employment tribunal, having inquired into an applicant's means, decided that the applicant had acted unreasonably in failing to attend a hearing and made a costs order against him under rule 12(1) of the Employment Tribunals Rules of Procedure 1993.

MR RECORDER BURKE QC, dismissing an appeal by the applicant, said that the applicant submitted that, in deciding that he had the means to pay costs before embarking on their decision as to whether he had acted unreasonably, the tribunal had, impermissibly, considered the applicant's means as part of their consideration as to whether or not he had behaved unreasonably. There was no express requirement in the rules that an employment tribunal should take a party's means into account in deciding whether to make a costs order. In *Beynon v Scadden* [1999] IRLR 700 the appeal tribunal had said that its previous decisions in *Wiggin Alloys Ltd v Jenkins* [1981] IRLR 275 and *Omar v Worldwide News Inc* [1998] IRLR 291 could not be taken as introducing any fetters on the broad jurisdiction which rule 12 conferred on employment tribunals and indicated that each case depended on its own circumstances and that it was a matter for the tribunal to decide whether or not to investigate means. Accordingly, there was nothing in the authorities to support the proposition that it was wrong in principle for a tribunal to consider means before deciding the question of reasonableness. The question of means was, in an ordinary case, likely to be capable of a simple answer after a simple investigation, and in many cases, if it was shown by such an investigation that there were no means, the tribunal might well not go on to consider the more difficult question as to whether the person against whom the costs order was sought had acted unreasonably. There was, therefore, good practical sense in looking at the question of means before the question of reasonableness, but it might be equally sensible, in a different case, to look at reasonableness before means, especially if it did not involve much investigation whereas the question of means might involve more investigation. In the present case there was no error of law in the tribunal having looked at means before reasonableness.

Zalzala v Sheffield University; 21 November 2000; EAT/976/99
EAT: Mr Recorder Burke QC, Mr D Norman and Ms H Pitcher

DISABILITY DISCRIMINATION

An employment tribunal found, as a preliminary issue, that, although the applicant suffered from dyslexia, he was able to carry out his normal day-to-day activities and was not disabled within the meaning of section 1 of the Disability Discrimination Act 1995.

JUDGE PUGSLEY, allowing an appeal by the applicant, said that, although the tribunal had correctly directed themselves as to the law, all the examples of day-to-day activities they had quoted were work-related and they had failed to carry out a widespread and comprehensive review of the definition of day-to-day activities as interpreted in the Guidance Notes. In *Goodwin v Patent Office* [1999] ICR 302 the appeal tribunal had made it clear that tribunals should adopt an investigative role and a purposive approach to the legislation. The tribunal did not appear to have carried out any balanced judgment of the applicant's day-to-day as opposed to work-related activities. The tribunal had defined the issues and set out a preliminary hearing. It would have been more helpful had the tribunal heard the whole case. Other matters might have thrown light on the fundamental question under consideration. Moreover, it would have saved time in the long run. Where there was an issue as to why the applicant was dismissed, hearing the evidence on that issue might very well throw light on whether the applicant was to be regarded as disabled and there was likely to be a more penetrating analysis of what had happened. The matter would be remitted and the tribunal invited to consider looking at the overall case rather than dealing with it in discrete parts.

Hutton v A E Proctor Ltd; 18 December 2000; EAT/1319/99
EAT: Judge Pugsley, Mr D J Hodgkins and Mr A D Tuffin

DISABILITY DISCRIMINATION

An employee who suffered from chronic fatigue syndrome was allowed to return to work on a part-time basis by using his annual leave. An employment tribunal found that the loss of leave caused him considerable concern and that his distress was compounded by the employer's failure to provide him with adequate support from other employees. The tribunal held that, for the purposes of section 6(1) of the Disability Discrimination Act 1995, the arrangements made for his return to work placed the employee at a substantial disadvantage in comparison with persons who were not disabled, and they upheld his complaint of discrimination under section 5(2).

LORD JOHNSTON, dismissing an appeal by the employer, said that the employer submitted, on the issue of the reasonableness of particular steps it was said could have been taken, that, if the substantial cause of the employee's stress related to the annual leave problem, the step of acting up cover or job share would have little benefit. The issue before the tribunal was essentially one of fact and they were entitled to hold that a substantial disadvantage had been established by reason of the fact that support had not been given even if the issue of annual leave also contributed to the question of stress. While the employee had been off work the job had been filled and there was no reason for that not to have continued so long as he needed help. It was unreasonable for the employer not to take the relevant steps to provide support, since it obviously had the resources to do so but chose not to use them.

Midlothian Council v Elliot; 28 November 2000; EAT/624/00
EAT (Sc): Lord Johnston, Miss S B Ayre and Ms A E Robertson

EMPLOYMENT TRIBUNAL

At the conclusion of the hearing of an applicant's complaint of unfair dismissal the tribunal's decision to dismiss the complaint was given orally. The applicant's representative then orally requested "written reasons" or "full written reasons". Summary reasons only were given and the applicant's representative subsequently wrote to the tribunal saying that extended reasons had been requested but had not been received. The chairman took the view that there had been no request for extended reasons and he refused to provide them.

LINDSAY J, on an appeal by the applicant against the refusal to give extended reasons, said that, bearing in mind that written reasons albeit in summary form issued in any event under rule 10(3) of the Employment Tribunals Rules of Procedure 1993 and that what were now called extended reasons used to be called "full reasons", one could not describe as unreasonable the applicant's thought that a request for full written reasons or even for written reasons was a request for extended reasons, yet the employment tribunal chairman, not hearing the word "extended", had not unreasonably taken the view that there had been no request for extended reasons. That unfortunate but understandable misunderstanding should not of itself deny any appeal by the applicant. The appeal tribunal could either require extended reasons to be given or exercise its discretion to proceed with the appeal on the summary reasons. Without adequate information as to which course to prefer, the tribunal would take the unusual step of ordering the applicant's appeal to proceed on summary reasons with the chairman being requested to supply his notes of evidence and submissions, if within 14 days of the judgment being sent to the employment tribunal chairman he indicated that it was not now practicable to compose adequate extended reasons. If no such indication was given, the chairman would be directed to supply extended reasons within a further four weeks.

Turtle v Stead & Simpson; 26 October 2000; EAT/854/99
EAT: Lindsay J, Mr D J Hodgkins and Mr D J Jenkins

HOLIDAY PAY

In order to comply with regulations 13(1) and 16(1) of the Working Time Regulations 1998, an employer reduced all employees' hourly rates of pay to make provision for their holiday pay. Complaints by employees that the employer had made unauthorised deductions from wages were dismissed by the employment tribunal.

JUDGE WILCOX, allowing an appeal by the employees, said that the reduction in the hourly rate to fund the holiday pay had not been made with the consent or agreement of the employees. The tribunal had erred in law in concluding that the deductions from the employees' pay discharged the employer's liability under the 1998 Regulations to provide paid holidays. The tribunal had made a fundamental error by holding that under a contract of employment the employer could, without consent, unilaterally reduce entitlement to pay in order to fund holiday pay. Other considerations might arise if there was a consensual arrangement, but that was not the present case. The employer would be ordered to repay the deductions made.

Davies v M J Wyatt (Decorators) Ltd; 13 July 2000; EAT/1262/99
EAT: Judge David Wilcox, Mr D J Jenkins and Mr K M Young

MISCONDUCT

An employment tribunal found an employee to have been unfairly dismissed for using the telephone for personal calls in breach of policy when over the period of a year she appeared to have made two or three calls a week for about seven minutes each, the total cost being estimated at £37.76. The employer was found not to have followed a fair disciplinary procedure in dismissing her where, inter alia, she was summarily interviewed without warning and a disciplinary process was instigated minutes after the interview, dismissal following thereafter. The employee had over 13 years' service and no disciplinary matters on file.

BELL J, dismissing the employer's appeal, said that *Royal Society for the Protection of Birds v Croucher* [1984] ICR 604, a case of admitted serious dishonesty by a director, was authority for the proposition that there might be cases of admitted dishonesty in which it was not incumbent on the employer to give the employee a warning or carry out a detailed investigation before deciding that the employee should be dismissed. The employer contended that the employee's conduct was clearly dishonest, that there was no need for any warning or investigation and it was entitled to dismiss her on the basis of conduct which she admitted. That contention highlighted the error made by the employer in its original consideration of the employee's case. The employer equated the use of the phone for any personal reason with dishonesty, but the test of dishonesty was not simply objective. The best working test of what was dishonest was that propounded in *R v Ghosh* [1982] QB 1053, 1054 and involved a two-stage process: first, to decide whether according to ordinary standards of reasonable and honest people what was done was dishonest; secondly, if so, to decide whether the person concerned must have realised that what she was doing was by those standards dishonest. It was not necessarily obvious that using the employer's telephone for personal calls was dishonest. The employer did not investigate the question of dishonesty. It put the conduct into the same category, in effect, as stealing money. One could argue that a reasonable employer would be entitled to regard what the employee admittedly did as dishonest, but even so it did not mean that the employer necessarily had to dismiss her. In all the circumstances the duty on the employer to act fairly and reasonably required that it should investigate the seriousness of the offence in the particular case. However, nothing the appeal tribunal had said was meant to indicate that an employee who used the employer's telephone for personal calls was immune from properly conducted disciplinary action which might result in dismissal.

John Lewis plc v Coyne; 7 December 2000; EAT/581/99
EAT: Bell J, Mr G H Wright and Mr K M Young

TIME LIMIT

An employment tribunal awarded an applicant damages for breach of contract on a complaint which had been made after the expiry of the three-month time limit prescribed by article 7 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 without considering whether it had not been reasonably practicable to present the complaint in time and to extend time.

MR COMMISSIONER HOWELL QC, allowing an appeal by the employer, said that the employer had not at any stage of the proceedings below resisted the claim on the ground that it was out of time and the applicant submitted that there were no exceptional circumstances to permit the point to be raised for the first time on appeal. The employment tribunal, however, had acted outside its jurisdiction and that was one of the exceptional cases where the appeal tribunal would intervene to correct a plain, though unwitting, illegality on the part of the tribunal. The general rule that the appeal tribunal would not normally allow a decision to be challenged on grounds not argued below was well established, but so was the exception where the fact of the tribunal having strayed outside its jurisdiction appeared beyond doubt without any question of a further factual inquiry being needed. The employment tribunal's award of contractual damages would be set aside.

J F Knight (Roadworks) Ltd v Platfoot; 15 January 2001; EAT/550/99
EAT: Mr Commissioner Howell QC, Mr P Dawson and Mr P A L Parker

COMPENSATION

An employment tribunal upheld an employee's claim of unfair dismissal but in calculating his compensatory award restricted his compensation for loss of earnings to a period of 12 weeks from his dismissal on the ground that they were not satisfied that he had taken sufficient steps to find alternative employment at a time when he was in receipt of job seeker's allowance.

JUDGE PETER CLARK, allowing an appeal by the employee, said that the employee argued, first, that since he was in receipt of job seeker's allowance throughout the period between dismissal and the employment tribunal hearing and since it was the requirement of receiving that benefit that the claimant had taken all reasonable steps to obtain employment, he could not be said to have failed to mitigate his loss under section 123(4) of the Employment Rights Act 1996. That proposition could not be accepted as a matter of law. The question whether a claimant had satisfied the requirements of entitlement to job seeker's allowance according to the relevant government department was a relevant factor, but could not answer conclusively the judicial question as to whether or not he had mitigated his loss for the purposes of section 123(4). However, the employee took a second point, namely that in their reasons for their substantive decision the employment tribunal observed, correctly, that the burden of proving loss lay on the employee, but went on to assume that he also bore the burden of showing that he had taken reasonable steps to mitigate the loss. He did not. Although in *Scottish & Newcastle Breweries plc v Halliday* [1986] ICR 577 a division of the Employment Appeal Tribunal held that the onus lay on the applicant to establish that he had taken reasonable steps to mitigate his loss, that approach had been disapproved by later divisions in *Morganite Electrical Carbon Ltd v Donne* [1988] ICR 18 and *Fyfe v Scientific Furnishings Ltd* [1989] ICR 648. The appeal tribunal was satisfied that the later divisions were correct on that point, following as they did the earlier Court of Appeal decision in *Bessenden Properties Ltd v Corness (Note)* [1977] ICR 821. It seemed clear that the employment tribunal had incorrectly placed the burden of proof on the employee to show that he had taken reasonable steps to mitigate his loss. Accordingly, the finding as to mitigation could not stand and the appropriate course was to remit the matter to the same tribunal to reconsider that question. It would be open to both parties to adduce further evidence, including documents which the employee had subsequently been refused permission to put before the employment tribunal.

Henderson v Northern Leisure plc; 17 January 2001; EAT/70/00
EAT: Judge Peter Clark, Lord Davies of Coity and Mr J C Shrigley

DISABILITY DISCRIMINATION

An employment tribunal upheld a complaint by an applicant of disability discrimination in relation to his dismissal on the ground that his employers had not shown that they had made reasonable adjustments to compensate for his disability in accordance with section 6(1) of the Disability Discrimination Act 1995 in that no real effort had been made to find alternative work for him after he became unable to continue to work as a process operator at an oil refinery.

JUDGE COLLINS, dismissing an appeal by the employers, said that underlying the whole of the tribunal's reasoning was a view that the employers did not really wish to keep the applicant in their employment. The essence of the employers' appeal was that the tribunal had not identified in their reasons any specific step under section 6 which the employers were under a duty to take in order to prevent the arrangements made by them from placing the applicant at a substantial disadvantage. It was correct that the tribunal had not identified any particular step. There was no material on which the tribunal were able to conclude that there was suitable employment available or that some suitable alternative employment would have become available in the reasonably foreseeable future. Without laying down any general rule as to what the burden of proof was in relation to potential adjustments under section 6, where, as in the present case, the potential for alternative employment lay for practical purposes exclusively within the knowledge of the employer, there was a burden of proof on the employer to satisfy the tribunal that there was no alternative employment either available or available in the reasonably acceptable future for the employee. Accordingly, the employment tribunal were entitled to reach the conclusion they did on the ground that the employers had not discharged the burden of proof on them.

Conoco Ltd v Booth; 30 January 2001; EAT/83/00
EAT: Judge Collins, Lord Davies of Coity and Mr P A L Parker

DISABILITY DISCRIMINATION

On complaints by an employee of unfair dismissal and disability discrimination, an employment tribunal held that he had been unfairly dismissed and awarded compensation subject to a contribution in respect of his own fault of 50%. The tribunal also upheld his disability discrimination complaint in respect of the failure by the employers to make adequate adjustments and made a substantial order for compensation, but without any deduction in respect of contribution, saying that, had the employers given the employee the kind of assistance they were under a duty to provide, there was a strong probability that the lapses on his part that had led to his dismissal in August 1997 would have been avoided.

LORD JOHNSTON, allowing an appeal by the employers, said that the tribunal had proceeded on a wholly false basis with regard to the applicability of the Disability Discrimination Act 1995 to events between June and December 1996, being unaware that the relevant sections did not come into effect until December 1996. Given that situation, their decision could not stand in relation to disability discrimination; nor in relation to unfair dismissal, by reason of the fact that the finding on fairness was substantially based on the existence of discrimination prior to December 1996. Further, the tribunal's approach to contribution in relation to the discrimination aspects was flawed, given a finding of 50% contribution by the employee in relation to the unfair dismissal. The appeal tribunal would not suggest that, in some cases, a finding of contributory fault in relation to a successful claim for unfair dismissal would necessarily bear on a quite separate claim for discrimination, whether on race or disability grounds, at the instance of the same employee in respect of the same employment. However, where the two were inextricably bound up, as in the present case, inasmuch that it was the employee's conduct that led to the dismissal but it was said that the employers' failure to look after his interests in relation to the Act rendered the dismissal unfair, logic dictated that if there was to be a 50% contribution in relation to unfair dismissal the same must apply in respect of the discrimination, having regard to the fact that under section 8(3) of the 1995 Act compensation was to be assessed as a claim for reparation at common law where contributory negligence or fault, if applicable, was a highly relevant element. As the decision was fundamentally flawed by reason of the false premise on which it had proceeded, the matter would be remitted for a fresh hearing before a different tribunal.

Fife Council v McPhee; 27 February 2001; EAT/750/00
EAT(Sc): Lord Johnston, Dr A H Bridge and Miss A Martin

REMEDY

An employment tribunal upheld a claim by an employee that he had been discriminated against by way of victimisation within the meaning of section 2 of the Race Relations Act 1976 when he was not appointed to one of the vacant posts of tenancy services officer in January 1998 and awarded compensation of £10, 221 based on the difference in salary for the period January 1998 to May 1999, when the employee turned down the employers' offer of a tenancy services officer post.

LINDSAY J, allowing in part an appeal by the employee against the remedies decision, said that under regulations 2 and 7 of the Employment Tribunals (Awards in Discrimination Cases) Regulations 1996 there was a duty on the employment tribunal to consider whether to include interest on compensation awarded, even if neither party addressed the tribunal in relation to interest. In the present case, the tribunal's reasons showed no consideration being given to the subject of interest. That was an error of law. The second ground of appeal related to the tribunal's decision that "The employee did not seek a recommendation under section 56(1)(c) of the 1976 Act. None therefore is made." The question was whether it was an error of law for a tribunal which could be seen to have had that provision in mind not to make a recommendation because none was sought. The answer could only be that it depended on the circumstances of the case. The action to be recommended must appear to the employment tribunal to be practicable for the purpose of obviating or reducing the adverse effect on the complainant of the act of discrimination. The adverse effect the amelioration of which was to be the practicable purpose of the recommendation was not some nebulous or general adversity but the adverse effect on the complainant of the very act of discrimination complained of and held to be well-founded. The recommended action must be such that the tribunal could be expected to be able to specify a period within which it was to be taken and it must be capable of being specified with reasonable clarity. Careful consideration needed to be given to whether an apparently obvious step to be recommended would not itself be potentially discriminatory against others. Moreover, detailed information as to the circumstances of the job and practices of the workplace would often be required. Still less, in such cases, would it be reasonable that the tribunal should be expected to specify a recommendation without receiving argument and assistance from the parties. Thus, it could not be said that it was invariably an error of law for a tribunal which had the provision in mind not to make a recommendation because none was sought, and the tribunal had not so erred in the circumstances of the present case.

Fasuyi v Greenwich London Borough Council; 20 October 2000; EAT/1078/99
EAT: Lindsay J, Mr P Dawson and Mr B M Warman

UNFAIR DISMISSAL

An employment tribunal dismissed an employee's complaint of unfair constructive dismissal, holding that the employer had acted reasonably in demoting the employee for poor time-keeping, that there was no fundamental breach of his contract of employment and that the dismissal was within the band of reasonable responses of a reasonable employer.

LORD JOHNSTON, dismissing an appeal by the employee, said that the tribunal's reasoning confused issues of constructive dismissal which depended on an assessment of whether or not the employer was in material breach of the contract of employment with issues of fairness which arose when an employer effected a dismissal on one of the reasons acceptable under section 98 of the Employment Rights Act 1996. By definition, if constructive dismissal was achieved by reason of the employer having acted in such a way as to indicate for one reason or another that he was repudiating the contract of employment, whether by breach of an express term or by general conduct so outrageous that the employee was not bound to put up with it, the issue of fairness did not arise, because once a fundamental or material breach of contract had been established it could not be defended on grounds of fairness. It was inappropriate to introduce an issue of reasonableness into the issue of constructive dismissal beyond an assessment of the employer's conduct within the context of the contract of employment. There could not be an assessment of a band of reasonable response in relation to the employer's conduct in constructive dismissal because the employer had not effected such a dismissal. For that test to apply, there must have been a dismissal actually effected by the employer. However, on the facts, the appeal tribunal were quite unable to hold that the employer was in material, let alone fundamental, breach of contract when he demoted the employee for poor time-keeping. The way the employee had been performing his contract appeared to be in breach of the contract and that precluded him from relying on the contract in seeking constructive dismissal, since the trigger of the whole matter was his own conduct.

Johnstone v W Wilson & Sons; 27 February 2001; EAT/953/00
EAT(Sc): Lord Johnston, Dr A H Bridge and Miss A Martin

BIAS

When the hearing of an applicant's complaints of unfair dismissal, race and sex discrimination resumed six months after having being adjourned part heard, the applicant was too unwell to attend and her representative, who was black, sought a postponement which was twice refused. He made a third request adding that if he had been an Oxford educated white barrister he would not be so treated. The employment tribunal terminated the proceedings on the ground that they could not fairly determine the applicant's complaints in the light of that accusation of racism. A fresh tribunal ordered the complaints to be struck out under rule 13(2)(e) of the Employment Tribunals Rules of Procedure 1993 on the ground that the conduct of the applicant's representative had been scandalous.

JUDGE PETER CLARK, allowing an appeal by the applicant and a cross-appeal by the respondent against the first decision and dismissing the applicant's appeal against the second decision, said that the first question was whether the first tribunal had been entitled to discontinue the proceedings without notice to the parties. It was common ground that a tribunal had power to order the discontinuance of proceedings and direct a case to be heard by a different tribunal by a combination of its powers under rules 13(1) and 16 of the 1993 Rules, but it was a power to be used sparingly and only for good reason, and the first tribunal had been wrong to order discontinuance. First, it was already an old case. Secondly, the tribunal were 12 days into a hearing anticipated to take 18 days. Thirdly, the context was important. The tribunal had retired to consider the representative's third application for an adjournment on the ground of the applicant's inability to attend due to illness. When they returned, without canvassing the views of either representative, and in the absence of the applicant, they simply declared that they felt unable to continue. It was the duty of any judicial body to approach its task with impartiality and equanimity, not to abdicate its responsibility. Where its authority was challenged, it had to deal with that challenge itself. The proper course would have been to require the applicant's representative to affirm or withdraw his accusations. If he had continued to press his claim of racial bias, it would then be for the tribunal, either of its own motion, or on the basis of an application by the respondent after discontinuance had been ordered, to consider a strike out under rule 13(2)(e). Alternatively, if he withdrew his remarks it would have been open to continue the hearing with or without an adjournment. Given the nature of the representative's remarks, set against the background, the proper course for the tribunal would have been to adjourn the case, giving the applicant notice of the possibility of a strike out and an opportunity to be heard on that. The next question was whether the appeal tribunal should strike out the complaints. The representative, in making an unwarranted charge of racial bias, was attempting to interfere with the due administration of justice and effectively succeeded. His conduct was scandalous, as the second tribunal found, and, coming on top of his repeated applications for an adjournment, was also vexatious. Ought the applicant to be fixed with her representative's conduct in her absence? She plainly gave him express instructions to persist in his applications for an adjournment. So far as his remarks were concerned, it was sufficient that a party had instructed the representative to conduct the case on her behalf, but also the applicant had in an affidavit wholeheartedly endorsed his remarks. The complaints would be struck out, and, the applicant having acted unreasonably in conducting the proceedings within the meaning of rule 12(1) and given her means to the second tribunal, the costs order of one day's costs made by that tribunal in favour of the respondent would be upheld.

Bennett v Southwark London Borough Council; 26 January 2001; EAT/1273/97
EAT: Judge Peter Clark, Mr K Edmondson and Mr D J Hodgkins

EMPLOYMENT TRIBUNAL

A respondent employer attended a hearing at an employment tribunal without witnesses or legal representation believing it would be a hearing for directions. A tribunal chairman, sitting alone, refused to adjourn the proceedings and proceeded to hear and determine the employee's claim for payment of salary and bonus following the termination of his employment, which involved determination of disputed issues of fact as to whether the employee had been in breach of his contract.

MR COMMISSIONER HOWELL QC, allowing an appeal by the employer, said that it was apparent that the case required the resolution of substantial disputes as to issues of fact and an assessment of the credibility of individual witnesses. If a chairman did not exercise his discretion, on reasonable grounds, under section 4(5) of the Employment Tribunals Act 1996 in favour of sitting alone, a case had to be heard by an employment tribunal fully and properly constituted under section 4(1). On the material before the appeal tribunal, the required consideration under section 4(5) never took place in the present case. The consequence was that there had been a clear error of law, and it was not necessary to consider whether the proceedings before the chairman were a nullity or only an irregularity. Further, the only reasonable conclusion to which a chairman could have come, in addressing the issue under section 4(5), was that the case was one which required to be dealt with by a full employment tribunal. Accordingly, the employment tribunal decision would be set aside and the case remitted to a full tribunal.

Professional Selection & Development Ltd v Wahab; 26 October 2000; EAT/64/00
EAT: Mr Commissioner Howell QC, Mr I Ezekiel and Lord Gladwin of Clee

REDUNDANCY

An employer undertook a redundancy selection process using an established standard assessment procedure based on factors relating to performance, length of service, etc, each marked on a points system and then given different weightings. An employee was told that he had been provisionally selected for redundancy and a brief discussion took place. There was no further discussion until four days later when he was told that there were no suitable alternative positions and that he could appeal under the grievance procedure. An employment tribunal, by a majority, upheld his complaint of unfair dismissal on the grounds that the selection procedure was flawed and that the opportunity for consultation had been inadequate.

MR COMMISSIONER HOWELL QC, allowing an appeal by the employer, said that the issues of fairness and reasonableness in relation to the employee's dismissal needed to be judged by the test of the "range of reasonable conduct" for a reasonable employer in the circumstances facing the employer at the time. Only if the selection system itself, or the way it was applied in the employee's individual case, fell outside that range could his dismissal for redundancy properly be characterised as unfair. The detailed reasoning of the majority of the employment tribunal indicated that they were addressing some question other than the range of what might have been done by a reasonable employer. Even if not overtly intending to substitute their own view as to how they would themselves have acted, they had fallen into the error against which tribunals were enjoined by *British Aerospace plc v Green* [1995] ICR 1006, 1009–1010, of allowing themselves to get involved in an over-detailed exercise of picking away at individual aspects of the standard selection system used by the employer and of its application in the particular case: even down to making criticisms of individual markings awarded. Moreover, the criticisms were not even well-founded and could not reasonably support a conclusion that the system and its application fell outside the range of fairness and reason. Specifically, there was nothing in the broadly defined performance categories or the weightings that could be said to make them by nature inappropriate for office employees. It was inherent in the nature of the exercise that the criteria must be capable of being applied uniformly across a broad range of employees, and that inevitably meant that they would be expressed in general and not individually tailored terms. The majority had misdirected themselves as to the test of fairness, and it necessarily followed that their decision could also not stand on the alternative ground of their secondary conclusion of procedural unfairness because of inadequate consultation. The case would be remitted for redetermination of all issues. But the previous tribunal's unanimous findings of fact might properly be taken as the practical starting point. Also, it was the view of the appeal tribunal that, while the adequacy of consultation was a matter of fact and degree for the tribunal to determine, it fell short of an adequate and reasonable standard of consultation for an employee to be told on Monday that he was to be selected for redundancy dismissal to take place on Friday and effectively left with the burden of instituting "grievance" procedures if he wished further consideration to be given to him. Reasonable consultation must involve a joint approach to what should be viewed as a mutual problem. If consultation was not to be futile it had to acknowledge at least the possibility of realistic alternatives and allow them to be properly explored.

Chronos Richardson Ltd v Watson; 27 March 2001; EAT/1340/99
EAT: Mr Commissioner Howell QC, Mr B V Fitzgerald and Mr H Singh

TRANSFER OF UNDERTAKING

Seven of the employees of a specialist scaffolding company worked exclusively at a power station where the company had a contract to provide scaffolding services. When the contract expired a contract for scaffolding, together with other services, was granted to another company, who did not take on any of the employees, using scaffolders from their own pool of labour. Meanwhile, the employer's contract was extended for 12 weeks to clear its scaffolding from the site. The employees brought complaints of unfair dismissal and entitlement to redundancy payments against both companies in the alternative, and their union brought a complaint against the first company alleging a lack of consultation contrary to regulation 10 of the Transfer of Undertakings (Protection of Employment) Regulations 1981. The employment tribunal concluded, as a preliminary issue, that there had been no transfer of an undertaking for the purposes of the 1981 Regulations.

JUDGE PETER CLARK, dismissing appeals by the employees and the union, said that it was submitted that the employment tribunal had been wrong to find that the two contracts were fundamentally different. That was a permissible finding with which the appeal tribunal could not interfere. Nevertheless, it was argued, it was in any event an irrelevant factor: merely because the service provided by the employer had been subsumed into a wider contract entered into by the second company was nothing to the point. The appeal tribunal disagreed: it was a relevant, though not conclusive, factor in determining whether the former economic entity operated by the employer was transferred to the second company if the service formerly provided differed materially from that provided by the incoming contractor. It was then submitted that the employment tribunal had elevated the factor into one determinative of the transfer question, and *Farmer v Danzas* (unreported) 6 October 1994 was relied on. But the facts of that case were far removed from those of the present case and no assistance was gained from the, plainly correct, observation by Morison J: "There is nothing in any European decision to suggest that an economic entity ceases to retain its identity merely because the economic activity is subsumed into the transferee's business." The employment tribunal in the present case did not appear to have isolated the factor as being determinative of the transfer question, as opposed to the employment tribunal in *Farmer* deciding that case on a single factor, all other factors pointing to a transfer, itself an impermissible consideration, so as to arrive at the opposite conclusion. Equally the appeal tribunal was satisfied that the continuation of the employer's contract had not been treated by the employment tribunal as being itself determinative. As to its relevance, it was submitted that there would often be cases in which the takeover by one contractor would take place over a period of time, and that there was a difference between the employer's original contract and the further contract, described by the tribunal as an extension, to remove the scaffolding. That, however, confused the contract with the economic entity, which consisted of scaffolding work involving a dedicated workforce using the employer's scaffolding equipment at the power station. The fact was that that part of the employer's undertaking continued while the second company was also on the site providing scaffolding services using its own men and equipment. In those circumstances it could not be said that the continuation of work by the employer was irrelevant to the overall question of whether the economic entity operated by the employer was transferred to the other company, retaining its own identity.

AEEU v Lyndon Scaffolding plc; 26 January 2001; EAT/1242/99
EAT: Judge Peter Clark, Mr W Morris and Mr J C Shrigley

WAGES

Employers reduced a sum of 70p per hour previously paid to an employee as an attendance bonus to 30p, removing some of the conditions attaching to it, and increased his basic hourly pay rate from £3.27 to £3.67 so that it complied with the national minimum wage. An employment tribunal dismissed a complaint by the employee that the employers were in breach of section 1(1) of the National Minimum Wage Act 1998 and regulation 11 of the National Minimum Wage Regulations 1999 or that they had made unlawful deductions from his wages contrary to section 13(1) of the Employment Rights Act 1996.

LORD JOHNSTON, allowing an appeal by the employee, said that regulation 31(1)(d) of the 1999 Regulations provided that allowances other than those attributable to the performance of the worker had to be left out of account in calculating remuneration in terms of section 1 of the 1998 Act. However, for the purposes of section 13 of the 1996 Act all such allowances could be taken into account in calculating wages. What then had to be considered in the present case was whether it was appropriate to look at the overall package in terms of ultimate take home pay or at the effect the new package had had on allowances. The appeal tribunal preferred the latter approach, since there was no doubt that under the new arrangement the attendance allowance, even when the conditions were varied, had in fact been reduced. That arrangement, whereby part of the attendance allowance was removed to supplement the rate of pay up to the appropriate level, could not be distinguished from the exercise carried out in *Davies v M J Wyatt (Decorators) Ltd* (unreported) 13 July 2000 [see Recent Points [2001] ICR Part 3], where it was held that to fund holiday pay by removing sums from the basic wage package was unlawful. Following that case, the appeal tribunal would hold that in the present case the effect of the arrangement was to create an unlawful deduction of wages. The matter would be remitted to consider the issue of whether there had been any consent to the variation by the employee.

Laird v A K Stoddart Ltd; 23 January 2001; EAT/834/00
EAT(Sc): Lord Johnston, Miss S B Ayre and Mr P M Hunter

COMPENSATION

An employment tribunal deducted a global amount of 50% from an award of compensation for unfair dismissal in respect of (i) an assessment of the chances of the applicant being kept in employment, had a fair investigation been carried out into the conduct for which he was dismissed, and (ii) the extent to which his conduct had contributed to his dismissal.

LORD JOHNSTON, allowing an appeal by the employers, said that the employers' argument was that, although the tribunal had identified two issues that it required to address, it had then intermingled them and reached a unitary conclusion which did not separate out those two issues which could be classified, respectively, as an assessment of whether or not, with a proper investigation, dismissal would still have followed (the *Polkey* approach) and, separately, the extent to which the applicant's conduct contributed to his dismissal. Reference was made to *Rao v Civil Aviation Authority* [1994] ICR 495, 501G in which Sir Thomas Bingham MR identified the two separate issues and declared that the *Polkey* type situation required to be considered and an assessment in percentage terms made before a tribunal went on to consider the question of contribution by way of conduct. The employers' approach was correct inasmuch that the tribunal was required first to consider the extent to which a *Polkey* type deduction should be made and only thereafter to go on to consider what percentage of the remaining figure should be subject to deduction again by reason of contribution. The appeal tribunal was unable to determine what was in the mind of the employment tribunal as a percentage to be deducted in relation to *Polkey*, and that was important because it was the net figure from any such deduction which required to be the base for any contribution. By way of example, if the view of the employment tribunal was that the *Polkey* deduction should be 50% and the applicant's conduct should be assessed at 50%, then the award should have been 50% of 50% and not 50% simpliciter. The matter would be remitted for clarification and assessment of the *Polkey* deduction and, separately, the issue of contribution.

Baillie v McFarlane; 2 May 2001; EAT/1403/00
EAT(Sc): Lord Johnston, Dr A H Bridge and Dr W M Speirs

FRUSTRATION

An employee who was unable to work as a result of suffering injuries to his hand at work remained "on the books" of the company by which he was employed, though he received no pay, apart from £10 of vouchers at Christmas, and was in receipt of various benefits. When the company went into receivership three years later he was sent forms relating to redundancy payments, but his claim for a payment was rejected by the Secretary of State for Trade and Industry. An employment tribunal dismissed his complaint for a redundancy payment on the ground that his contract of employment had been frustrated when he was injured.

JUDGE PUGSLEY, dismissing an appeal by the employee, said that the doctrine of frustration did apply to contracts of employment and had been correctly defined by the employment tribunal as occurring when an event made the contract impossible or unlawful to perform or radically different from what the parties originally intended. When such a contract was frustrated it came to an end without a dismissal by the employer or a resignation by the employee. It was argued on appeal that the employment tribunal had given insufficient weight to the fact that a contract of employment was a voluntary relationship between parties and it was a contradiction in terms that, although both parties regarded the employment as continuing, it had in fact terminated. It was said that the doctrine of frustration did not permit a court to impose on the parties a termination of the contract against their will. Counsel sought to distinguish *Sharp v McMillan* [1998] IRLR 632 on the ground that in that case both parties recognised there was no prospect of the employee returning to work and it was agreed he be kept on the books to qualify for a more generous pension. It was submitted in the present case that a distinguishing factor was that the parties acknowledged the contract had come to an end and entered into a different arrangement. But in *Sharp* Lord Johnston said, at para 20: "if a contract is frustrated by operation of law, there is nothing to revive and a nullity has to be declared. There is nothing to prevent parties entering into a new arrangement but they must do so with the clear intention to achieve that result . . . If the parties both think . . . the previous contract is still subsisting, there is no intention to create a new contract . . ." In the present case the employment tribunal had found as a fact that, contrary to what the employee contended, he had no real intention of going back to work and there was no prospect of his doing so. Given that finding, it could not be said that the tribunal had erred in concluding that frustration of the contract had taken place. The contract no longer subsisted and, therefore, the employee was not eligible for redundancy pay.

Collins v Secretary of State for Trade and Industry; 31 January 2001; EAT/1460/99
EAT: Judge Pugsley, Mrs J M Matthias and Mr D Norman

PROTECTED ACT

An employment tribunal held that it had no jurisdiction to hear an applicant's complaint, pursuant to section 103A of the Employment Rights Act 1996 (as inserted by the Public Interest Disclosure Act 1998), that he had been unfairly dismissed in September 2000 because of a protected disclosure he had made in November 1993, on the ground that the disclosure relied on had taken place before section 103A came into effect in July 1999.

LORD JOHNSTON, allowing an appeal by the applicant, said that the preliminary issue to be determined was whether the protection now afforded by section 103A of the 1996 Act could apply in relation to a disclosure which took place prior to the coming into force of that section. It was not disputed that what the applicant was said to have done in 1993 by reporting his employers to the Inland Revenue amounted to a protected disclosure. It appeared that the question at issue was novel, not only in relation to protected disclosure, but generally in relation to protected conduct, and, indeed, in relation to unfair dismissal generally. In the opinion of the appeal tribunal, the section was not properly to be regarded as having any retrospective effect in relation to the present case, because the crucial aspect was the fact that the dismissal was effected after it came into force. It was that act of the employers that required the applicant to claim a protected disclosure. It was a voluntary act on the part of the employers and it was not, therefore, appropriate to regard the legislation as having taken away any rights available to them. The disclosure having been made in 1993 acquired the status of a protected disclosure when it became relevant to an issue of dismissal subsequent to 1998. There was nothing inconsistent or unfair in that approach and, indeed, it would be very surprising if, in relation to unfair dismissal cases generally, going back to when the legislation was first implemented, it would be incompetent for either an employer or an employee to refer to conduct predating the coming into effect of the legislation. If the issue was to be balanced as one of fairness, it would be manifestly unfair that the applicant should be denied the right to claim a protected disclosure if it was relevant to a dismissal effected after 1999 notwithstanding that the actual act of disclosure might have been many years before.

Miklaszewicz v Stolt Offshore Ltd; 2 May 2001; EAT/1385/00
EAT(Sc): Lord Johnston, Miss S B Ayre and Mr P M Hunter

TIME LIMIT

An employment tribunal dismissed an employee's complaint of unfair dismissal, made some two years after the effective date of termination of his employment, on the ground that it was not satisfied that it had not been reasonably practicable for the complaint to have been presented in time under section 111 of the Employment Rights Act 1996.

BELL J, dismissing an appeal by the employee, said that the essence of the employee's case was that he had been unable to make his application earlier than he had because of continued mental ill-health following a breakdown due to his work conditions. It was argued, first, that the employment tribunal had erred in making a distinction between presenting, or setting in motion, a claim on the one hand and prosecuting, and thus proceeding with, it on the other, so far as the first stage of the test for section 111(2)(b) was concerned. Moreover, it was argued, it would be unjust if an application by someone who was mentally ill was "presented" for the purposes of section 111(2) by the mere act of getting it to the office of the employment tribunal, because he might be met by an application challenging his entitlement to bring proceedings or an application to strike out for want of prosecution. But the prosecution of a claim was a very different exercise to its presentation as described in rule 1(1) of the Employment Tribunals Rules of Procedure 1993, and it made obvious sense both that an application should be promptly presented in that sense and that presentation in that sense was all that was required to meet the requirements of section 111(2). It was sufficient if the Form IT1 stated the nature of the claim quite simply. It made no sense to suggest that "presented" was meant in its simple sense, as it clearly was, for the purpose of meeting the time limit in section 111(2)(a) but meant "presented and prosecuted" for the purposes of what was reasonably practicable, or indeed, reasonable, when applying paragraph (b).

Turner v Havering London Borough Council; 4 December 2000; EAT/1066/99
EAT: Bell J, Lord Davies of Coity and Mrs D M Palmer

COMPENSATION

When awarding compensation for unfair dismissal an employment tribunal, inter alia, reduced the compensatory award by 50% on the ground that it was just and equitable to do so to reflect the extent to which the applicant's actions contributed towards his dismissal "bearing in mind a range of factors including the employer's [conduct]".

LINDSAY J, allowing an appeal by the employer, said that it was argued by the employer that the tribunal had misapplied section 123(6) of the Employment Rights Act 1996 in that it had had regard to the employer's conduct as well as the applicant's conduct rather than limiting its inquiry to the applicant's conduct. The cases showed that in considering section 123(6) the tribunal was limited to looking at the extent to which the dismissal had been caused or contributed to by any action of the applicant. It was inescapable that the tribunal had erred in law in looking outside that to which section 123(6) limited it. The extraneous matter taken into account could only have served to reduce the amount of the reduction, as if to reflect some wrong on the employer's part. That error alone justified setting aside the compensatory award.

London Underground Ltd v Shah; 27 February 2001; EAT/0140/00
EAT: Lindsay J, Lord Davies of Coity and Mrs R A Vickers

CONSTRUCTIVE DISMISSAL

An employee resigned following his employer's decision that he could no longer deal with cash transactions because he was suspected of dishonesty. An employment tribunal rejected his complaint of unfair dismissal, holding that he had not been constructively dismissed because the employer had not fundamentally changed his job and so had not repudiated his contract of employment.

MR RECORDER LANGSTAFF QC, allowing an appeal by the employee, said that the employee's job description had never formally been reduced to writing. In such circumstances the only material available to identify what he was obliged to do for his employer was the way in which the contract had been performed. With the guidance of Lord Hoffmann in *Carmichael v National Power plc* [1999] ICR 1226, 1234, it was open to the employment tribunal to find that the employee's employment was as a builders' merchants yard operative. The tribunal found that his "principal job" was "serving customers". The "new" duties proposed by the employer did not relate at all to dealing with customers. Requiring an employee to cease doing what had been his principal job and to take up a new role, in circumstances in which there had been no allegation of dishonesty, would amount to a variation of the employee's contract. Such a variation could not be imposed without the employee's consent. To do so would almost always be capable of being a repudiatory breach. Whether it reached the materiality sufficient for the breach to be repudiatory had to be judged objectively by reference to its impact on the employee. Once the breach was of sufficient materiality to be regarded as repudiatory, the underlying motive became irrelevant. The presence of an allegation of dishonesty thus made no difference. On the facts recorded by the tribunal, it would be difficult to come to the conclusion that there had been no fundamental change in the employee's job. It was not possible to tell how the employment tribunal had reached such a conclusion. The appeal would be allowed and the matter remitted for rehearing, when the issue was likely to be whether the constructive dismissal was unfair.

Hilton v Shiner Ltd; 24 May 2001; EAT/9/00
EAT: Mr Recorder Langstaff QC, Ms B Switzer and Miss S M Wilson

DISABILITY DISCRIMINATION

An employee who suffered from depression was dismissed because she had been absent from work for over a year on medical grounds. An employment tribunal dismissed her complaint of disability discrimination, finding that there was no evidence that the employers would have treated differently anyone else who had been absent for a year, and, after hearing evidence from the employee and her doctor, that no reasonable adjustments could have been made.

LINDSAY J, allowing an appeal by the applicant, said that one possible error of law by the employment tribunal was that, in deciding whether the employee was disabled, they had not looked at the correct point of time at which disability needed to be adjudged. The appropriate time was the date of the unfavourable treatment alleged. But there was no cross-appeal on that point. More significantly, it was plain that, despite their reference to *Clark v Novacold Ltd* [1999] ICR 951, the tribunal had taken the required comparison, under section 5(1)(a) of the Disability Discrimination Act 1995, to be between the treatment of the disabled person and the treatment of anyone else who had been absent for a year. That was not the correct comparison. The correct approach was to ask, first: what was the reason for the employee being dismissed? The reason was her long absence from work and that she was unable to predict when, if ever, the medical prognosis would be such as to enable her to return. The second question was: was that reason one which related to her disability? Answer: "Yes". The third question was: would the employers have dismissed some other person to whom that reason would not apply? Answer: "No"; there would have been no reason to do so—it was not, for example, as if there had been shown to be a redundancy situation. The employment tribunal had erred in looking only to whether some other person absent from work for a year would equally have been dismissed. It was not clear whether the employment tribunal were of the view that the employers were under any section 6 duty to make adjustments, stating that neither the employee nor her general practitioner could think of anything that would have represented a satisfactory adjustment. But the duty to make adjustments under section 6 was on the employers, and the employers had not considered any adjustments, as it had been their view that the employee was not suffering from any disability. There would, no doubt, be cases where the applicant's evidence alone would establish a total unavailability of reasonable and effective adjustments, but it did not follow that, because the applicant, long absent from work and clinically depressed, and her general practitioner, who was unlikely to know what office or other practicabilities were open to the employers, could postulate no useful adjustment, the section 6 duty on the employers should, without more, be taken to have been satisfied.

Cosgrove v Caesar & Howie; 6 June 2001; EAT/1432/00
EAT(Sc): Lindsay J, Dr A H Bridge and Mr R P Thomson

RACE DISCRIMINATION

An employment tribunal upheld an applicant's claim of racial discrimination contrary to section 4(2)(c) of the Race Relations Act 1976 against both the first respondent, who had dismissed him, and the second respondent, which had acquired the business of the first respondent, holding that the former had been acting as agent for the latter for the purposes of section 32(2) of the Act.

MR COMMISSIONER HOWELL QC, allowing an appeal by the second respondent, said that no ground had been demonstrated for challenging the relevant factual conclusions of the employment tribunal: in particular that the applicant's dismissal by the first respondent was an act of unlawful discrimination carried out by the management of that company but with the encouragement and at the instigation of the second respondent. The question was whether those facts gave rise to any liability on the part of the second respondent itself under the 1976 Act. Acts which were made unlawful only by section 31 of the Act (inducing, or attempting to induce, another person to do any act which contravened Part II or III) were outside the jurisdiction of employment tribunals. Conduct consisting only of encouragement or instigation might not therefore give rise to a claim in an employment tribunal against the person responsible, even though done to induce an unlawful act against a person in employment. An unlawful act for which a claim might be brought against the inducer had to be identified: either one unlawful by virtue of Part II of the Act itself, so that the tribunal had jurisdiction under section 54(1)(a), or one made unlawful under section 32 or 33, by treating the inducer as having committed an act of discrimination contrary to Part II against the complainant, so that the tribunal had jurisdiction under section 54(1)(b). The acts of discrimination made unlawful under Part II were, so far as relevant, defined in section 4, in each case limited to acts by a person "in relation to employment by him". The structure of section 32 was simply to attribute the authorised acts of an agent to his principal for the purpose of other provisions of the Act. It did not provide any separate way in which those acts were made or treated as unlawful, under Part II or section 32 itself. The act found by the tribunal to have been done by the first respondent at the second respondent's instigation was the dismissal of the applicant. However, that dismissal was from the employment of the first respondent; the applicant had never been an employee of the second respondent and there could be no finding that he had ever been employed by the first respondent as agent of the second respondent or in any other way than on its own behalf acting as principal. It followed that the applicant's dismissal could not amount to an act of unlawful discrimination contrary to section 4(2)(c) on the part of the second respondent, since he was at no time employed by it.

School of Finance & Management (London) Ltd v Perera; 3 May 2001; EAT/542/00
EAT: Mr Commissioner Howell QC, Mr B Fitzgerald and Lord Gladwin of Clee

SEX DISCRIMINATION

An employment tribunal dismissed a complaint by a lecturer and course leader that by failing to consult her concerning matters relating to the course while she was on maternity leave the respondent college had discriminated against her on the ground of her sex.

JUDGE PETER CLARK, dismissing an appeal by the applicant, said that it was accepted that to subject a woman to a detriment because of her pregnancy was unlawful sex discrimination. It followed that, if the treatment complained of by the applicant amounted to a detriment and was causally connected to her pregnancy, her claim succeeded. In *Jerimiah v Ministry of Defence* [1980] ICR 13, 26, Brandon LJ said that "detriment" meant "putting under a disadvantage". The factual question as to whether the applicant was put at a disadvantage might be answered by reference to whether a reasonable employee might or might not take the view that there was a detriment. To constitute a detriment there had to be something serious or important about it. The critical question was whether, on the facts found by the employment tribunal, the tribunal were entitled to conclude, expressly or implicitly, that the applicant had not suffered a detriment by not being consulted during her maternity absence. The need for consultation and its timing were material factors for the tribunal to consider. The bald assertion by the applicant that no consultation during maternity leave equalled unlawful discrimination without more could not be accepted. The tribunal's findings on the absence of consultation and its effect on a reasonable employee, as opposed to the applicant's subjective view, were permissible; and, absent detriment, the statutory tort was not made out.

Ojinnaka v Sheffield College; 7 March 2001; EAT/0201/00
EAT: Judge Peter Clark, Mr D Chadwick and Mr B Gibbs

STRIKING OUT

An employment tribunal chairman struck out an applicant's claim of race discrimination, in relation to the respondent's decision to strike him off its register of nurses, on the basis that it was frivolous, that it had no chance of success and was an abuse of process.

JUDGE ALTMAN, dismissing an appeal by the applicant, said that the chairman had concluded: "In the absence of any true comparators the applicant raises no prima facie case of race discrimination. His claim is frivolous in that it has no substance." It was true that in some cases the identification of comparators did require an input from the respondent, but in the present case there was, on the tribunal's finding, no scope for an argument that there was an appropriate comparator. Rule 13(2) of the Employment Tribunals Rules of Procedure 1993 provided the power to strike out any originating application on the grounds that it was "scandalous, frivolous or vexatious". The applicant complained that the proceedings had been struck out without hearing evidence, but the rules envisaged that if a matter was plain without the need for evidence the claim should be struck out. It was submitted that the words "scandalous, frivolous or vexatious" were not designed to cover cases where there was no reasonable prospect of success and that if Parliament had intended the power to strike out to be so used it would have said so in rule 13 or have referred to it in rule 7. The appeal tribunal disagreed. It was said that Parliament, by dealing with the prospects of success in rule 7(4), had indicated a narrower meaning for "scandalous, frivolous or vexatious" than in other jurisdictions. The appeal tribunal did not see why that should be so. "Frivolous" often meant lacking in substance, and the words "frivolous or vexatious" had been used in the courts for over 100 years and the *Supreme Court Practice* defined them as applying to cases which were "obviously frivolous or vexatious or obviously unsustainable". The finding that there was an abuse was, strictly speaking, wrong. There was no power to strike out on the grounds of abuse of process. But the finding that the claim was frivolous in that it had no chance of success was one which the tribunal chairman had been entitled to make and there was no error of law in that respect.

Balamoody v UKCC for Nursing Midwifery & Home Visitors; 5 December 2000; EAT/744/99
EAT: Judge Altman, Mrs R A Vickers and Mr G H Wright

COSTS

An employment tribunal dismissed an applicant's complaint of race discrimination and ordered him to pay the respondent employer's costs on the ground that, in bringing and conducting his case, he had behaved frivolously, vexatiously and unreasonably, though not abusively, within the meaning of rule 12(1) of the Employment Tribunals Rules of Procedure 1993.

MR RECORDER BURKE QC, dismissing the applicant's appeal against the costs order, said that the ground of appeal was that the employment tribunal had erred in law in their interpretation of the way in which evidence had been given at the hearing so as to conclude that the applicant's conduct in pursuing his claim was capable of being frivolous, vexatious or otherwise unreasonable, when there had been no strike out proceedings on the basis of lack of merits and no costs warning. The appeal tribunal wished to make clear that employment tribunals should always have in mind the very real difficulties which faced a claimant in a discrimination claim. It followed that, in the absence of misconduct, a costs order in a discrimination case was likely to be made only in a very rare and even exceptional case. However, it was for the employment tribunal to decide whether a party had behaved frivolously, vexatiously or otherwise unreasonably and whether to make a costs order, exercising a discretionary jurisdiction. The appeal tribunal did not accept that an employment tribunal could not make a costs order against an applicant simply because there had been no previous application to strike out, no application under rule 7(4) of the 1993 Rules or no warning as to costs. Those were factors which a tribunal might or might not wish to take into account but the appeal tribunal could not see how it could be laid down as a matter of law or guidance that such matters could be preconditions to the exercise of a broad discretion under rule 12. The tribunal's decision was not perverse.

Saka v Fitzroy Robinson Ltd; 14 March 2001; EAT/0241/00
EAT: Mr Recorder Burke QC, Mrs R Chapman and Mr G H Wright

EMPLOYMENT TRIBUNAL

Following the opening by his representative of his complaint of constructive unfair dismissal, an applicant was informed by the employment tribunal that "bearing in mind his resignation letter and that he appeared to be unable to identify any breach of contract, it was the opinion of the tribunal that the applicant's complaint did not have any reasonable prospect of success". The applicant was warned that "if at the conclusion of this case the tribunal considered that he had in bringing these proceedings acted frivolously or unreasonably the tribunal would consider making an award of costs". The applicant then withdrew his complaint and his originating application was dismissed.

JUDGE WAKEFIELD, allowing an appeal by the applicant, said that in normal circumstances where an applicant had withdrawn an originating application and it had been dismissed by an employment tribunal, any appeal against the decision of the tribunal made in consequence of the withdrawal would be bound to fail. The circumstances of the present case, however, were not normal. The way in which the employment tribunal had conducted itself had resulted in a denial of a fair hearing of the applicant's originating application. While a tribunal might, and often should, explore with the parties any perceived weaknesses of the case, either at the outset or during the hearing, and might properly alert a party who might otherwise not know its powers regarding costs, what had occurred in the present case went far beyond the sort of useful dialogue which assisted in resolving or limiting the matters in dispute. The tribunal, in the language it used, even if it was not in fact the case, had demonstrated a concluded view hostile to the applicant. That had caused the applicant to abandon his claim. The appeal tribunal were satisfied that he did that by reason of the pressures he felt to have been exerted by the employment tribunal through their expressed view as to the merits of his case and the possible consequences to him in costs.

Lewis v Kingston-upon-Thames Royal London Borough Council; 3 May 2001; EAT/0221/00
EAT: Judge Wakefield, Mr D J Jenkins and Miss S M Wilson

EVIDENCE

An employment tribunal upheld an applicant's complaint that she had been unfairly dismissed, having found that the question depended to a significant extent on what had happened at a particular meeting and that the tribunal preferred the applicant's evidence. Subsequently, evidence came into the employers' possession which indicated that between her dismissal and the tribunal hearing the applicant had made numerous harassment calls to the mobile phones of executives of the employers. On an application by the employers for review, the employment tribunal revoked its earlier decision and directed a rehearing, on the ground that, had the tribunal been in possession of the new evidence at the original hearing, it would possibly have taken a different view of the applicant's credibility and reached a different decision.

SIR CHRISTOPHER BELLAMY QC, dismissing an appeal by the applicant, said that the applicant argued that the employment tribunal had been wrong to take account of facts that had arisen after the termination of her employment which were irrelevant to the question of the fairness of her dismissal, and she relied on *W Devis & Sons Ltd v Atkins* [1977] ICR 662 and *Soros v Davison* [1994] ICR 590. Those cases, however, were not authority for the proposition that evidence of post-termination events could never be admitted by an employment tribunal if such evidence was relevant to establishing what had in fact happened in the period prior to the termination of the contract. The law was correctly stated in *Harvey on Industrial Relations and Employment Law*, para D1[865]: "in very exceptional cases evidence of subsequent events may be admissible to establish the truth of evidence occurring before the dismissal . . ." Admission of such evidence was likely to be exceptional and employment tribunals needed to be vigilant to ensure evidence of events post-termination was not used to circumvent, by an indirect route, the principles of *Devis* and *Soros*. There was no doubt that the circumstances set out in rule 11(1)(d) of the Employment Tribunals Rules of Procedure 1993 were satisfied in the present case. It was, therefore, for the employment tribunal, in the exercise of the wide discretion conferred by rule 11(7), to decide whether the new evidence was such as to justify revoking its earlier decision. In the employment tribunal's view the new evidence cast strong doubt on the accuracy of the applicant's evidence, and it was a case that turned directly on the credibility of her evidence. There was no error of law in the exercise of the tribunal's decision.

Overton v Healthcall Services Ltd; 4 July 2001; EAT/282/01
EAT: Sir Christopher Bellamy QC, Mr W Morris and Mrs R Vickers

JURISDICTION

An employee who failed to attend the hearing of his complaints of breach of contract and breach of his right not to suffer a detriment under section 44 of the Employment Rights Act 1996 had both claims dismissed under rule 9(3) of the Employment Tribunals Rules of Procedure 1993 by an employment tribunal chairman siting alone.

JUDGE PUGSLEY, allowing an appeal by the employee, said that section 4(2) of the Employment Tribunals Act 1996 provided that proceedings specified in section 4(3) should be heard by a chairman alone, but the list did not include a claim under section 44 of the Employment Rights Act 1996. It was submitted by the respondent that rule 9(3) of the 1993 Rules did not require the hearing actually to begin and the employment tribunal to be assembled, but rather only non-attendance at the tribunal. It seemed implicit to the appeal tribunal that, where section 4 required a full tribunal to hear a case, an order dismissing the claim under rule 9(3) could not be made by a chairman sitting alone by virtue of rule 13(8)(b). If Parliament had laid down that a certain matter could only be heard by a full tribunal, then the proper interpretation of rule 13(8) was that only a full tribunal could exercise the power to dismiss under rule 9(3). The question then was whether the chairman's dismissal of the employee's case under rule 9 was still valid as far as it concerned the breach of contract claim, which she was empowered to hear alone. It seemed wholly misplaced to say that if a tribunal had to be fully constituted to hear the section 44 claim a tribunal consisting of a chairman alone could properly exercise its powers in respect of a claim such as breach of contract which did not need a full tribunal. The reality was that, had the chairman appreciated that she did not have power to deal with the section 44 claim, it would have been perverse of her to exercise the discretion to sit alone on another aspect of the case.

Gill v Whitbreads plc; 28 February 2001; EAT/1444/99
EAT: Judge Pugsley, Mrs D M Palmer and Mr G H Wright

PROCEDURE

An employment tribunal refused an application by a respondent employer to adjourn a remedy hearing pending its appeal to the Employment Appeal Tribunal against the decision of the employment tribunal upholding a complaint by the applicant employee following his dismissal.

JUDGE LEVY QC, dismissing an appeal by the employer, said that the law was still as stated in *Medallion Holidays Ltd v Birch* [1985] ICR 578, 584C where the Employment Appeal Tribunal had rejected the argument that that tribunal had power to review interlocutory decisions of industrial tribunals on their merits and had stated that interlocutory matters such as the granting or refusal of an adjournment were wholly within the discretion of the industrial tribunal. There was no authority, nor support from principle, for the employer's submission that while the decision of an employment tribunal was under appeal the tribunal had no locus to deal with the claim in any way, including fixing a remedy hearing. Remedy hearings in small cases such as the present were held while an appeal against the substantive decision was still extant.

John Menzies Ltd v Durrant; 5 December 2000; EAT/1426/00
EAT: Judge Levy QC, Mr P Dawson and Mr K M Young

TRANSFER OF UNDERTAKING

On an application by a trade union complaining of a failure to consult with employees, in accordance with regulation 10 of the Transfer of Undertakings (Protection of Employment) Regulations 1981, the employment tribunal held that the liability to pay compensation in relation to such failure, pursuant to regulation 11, did not transfer to the transferees, on the ground that the liabilities that transferred under regulation 5 were liabilities other than those provided for by the Regulations themselves.

LORD JOHNSTON, dismissing an appeal by the trade union, said that the case raised a sharp issue which was not determined by *Kerry Foods Ltd v Creber* [2000] ICR 556. The appeal tribunal was concerned that, if an employer, intending to transfer all or part of his business in such a way that the 1981 Regulations would apply, knew that any compensation payable by reason of his failure to consult his employees in advance of the transfer would be transferred to the transferee, there would be no incentive on the part of the employer to conduct such consultation process. Where matters were finely balanced, any construction of the words "liabilities under or in connection with any . . . contract" in regulation 5(2) should ensure that the employer had an incentive to comply with the obligations imposed on him in the transfer process. Such a construction required the conclusion that the transferor would retain responsibility to pay compensation for his own failure to consult with his employees. Accordingly, any obligation to pay compensation in terms of regulation 11 which was a responsibility of the transferring employer did not transfer to the transferee.

Transport & General Workers Union v James McKinnon, J R (Haulage) Ltd; 4 June 2001; EAT/103/01
EAT(Sc): Lord Johnston, Mr A J Ramsden and Mr R P Thomson

WAGES

A nightwatchman who was required to undertake duties during four hours of his 14-hour shift but was permitted to sleep or do other things during the remaining hours he was on the employer's premises claimed that, in paying him £210 a week for seven 14-hour shifts, the employer was in breach of the minimum hourly rate of pay prescribed by the Minimum Wage Regulations 1999. The employment tribunal dismissed his claim.

LORD JOHNSTON, allowing an appeal by the employee, said that the employment tribunal had taken the view that under regulation 15(1) of the 1999 Regulations the time worked by the employee would not exceed four hours per night and that that should be the proper measure of the extent to which remuneration was required under the Regulations. The appeal tribunal considered that regulation 15(1) did not apply to the employee's employment. What that regulation was designed to deal with was a situation where the employer specifically told the employee that during the relevant working period he was entitled to take so many hours off for sleep. A more apt analogy in the present case was an employer who required his employee to be available for work on his premises and it was his responsibility to provide work for him and if he did not do so he was still required to pay the employee because of the requirement for him to be on the premises. While it might be possible to enter into an average agreement for unmeasured work, if the employment was one to which the national minimum wage legislation applied, it had to be remunerated at the appropriate rate for those hours.

Wright v Scottbridge Construction Ltd; 4 April 2001; EAT/1050/00
EAT(Sc): Lord Johnston, Mr A G McQuaker and Dr W M Spiers

CONTINUOUS EMPLOYMENT

An employment tribunal rejected an employee's complaint of unfair dismissal on the ground that he had not been continuously employed for two years as required by section 108(1) of the Employment Rights Act 1996, where the employee had been dismissed, with others, from his job as a temporary gardener after five months because the money for their employment had run out, and re-employed six weeks later until his dismissal 22 months thereafter.

MR RECORDER UNDERHILL QC, allowing an appeal by the employee, said that the employment tribunal had rejected the employee's argument that the six-week gap in his employment had been "on account of a temporary cessation of work" within the meaning of section 212(3)(b) of the Employment Rights Act 1996, concluding that it was not planned as a temporary cessation of work and that not all those laid off were taken back. It was submitted on behalf of the employee that the tribunal had misdirected itself by treating as conclusive the fact, as it held, that the cessation of work was not "planned" to be temporary. That submission was well-founded. Whether or not a cessation of work was temporary had to be decided with hindsight, i e at the date when the employment finally ended and the question of continuity of employment fell to be determined. Accordingly, it was not sufficient for an employer to establish that at the time the employee was first laid off there was no firm intention to re-engage him at a particular time or at all. It was not submitted that the intention of the parties at the time was irrelevant. On the contrary, the decision was one of fact and degree in which all relevant circumstances were to be considered: those had to include the intention of the parties as to the duration of the lay-off. But the way in which the tribunal had expressed its reasons was not consistent with its having approached the issue in that way. The *only* factor it referred to was the intention of the parties at the time. In particular there was no consideration of the length of the actual period of lay-off relative to the periods for which the employee was employed, and such consideration was essential. Had the tribunal asked itself the correct question, the answer would have been plain. A cessation of work was "temporary" if it lasted only for a *relatively* short period of time. The employee had been employed for five and a half months prior to the lay-off and that employment had been followed by a further 22 months' employment. It was also material that he had been offered at least a reasonable prospect of re-engagement which eventuated shortly afterwards. So short a cessation, against that background, could realistically only be described as "temporary".

Fowler v Southend on Sea Borough Council; 23 April 2001; EAT/1021/98
EAT: Mr Recorder Underhill QC, Mr N D Willis and Mr K M Young

COSTS

A respondent employer was awarded the sum of £500 by way of expenses when an originating application by the applicant employee was struck out by the employment tribunal for want of prosecution and delay.

LORD JOHNSTON, allowing an appeal by the employer against the amount of the award, said that it was self-evident, on the face of the record, that an award of expenses was justified by reason of the applicant's conduct. An award of expenses was governed by rule 12 of the Employment Tribunals Rules of Procedure (Scotland) 1993. The employment tribunal had stated that, as it had no information as to the applicant's means, it was not appropriate to make an order under rule 12(3)(c) and, accordingly, awarded £500, the maximum payable under rule 12(3)(a). The employer submitted that the tribunal had misdirected itself by even addressing the question of means; and that it should have made an award under rule 12(3)(c). The appeal tribunal agreed. Whatever might be the purpose behind rule 12(3)(a), it should not detract from the general entitlement of a party otherwise entitled to expenses to receive the full amount due to them as compensation for the costs they had incurred. The notion of means was more relevant to any question of penalty, and an award of expenses was not, and should not be, regarded as penal. The protection available to the party against whom the order was made was taxation.

Lochgorm Warehouses v Gordon; 4 April 2001; EAT/1223/00
EAT(Sc): Lord Johnston, Mr G R Carter, Ms A E Robertson

DISABILITY DISCRIMINATION

At a hearing for directions on an employee's complaint of disability discrimination, the respondent employer accepted that the employee had a disability for the purposes of the Disability Discrimination Act 1995. Six months later, the employer applied to withdraw the concession. The application was refused by a chairman.

MS RECORDER COX QC, dismissing an appeal by the employer, said that it was argued that the employment tribunal only had jurisdiction to hear the employee's complaint if he was a person who suffered from a disability within the meaning of the Act and that no party could, simply by making a concession, confer jurisdiction on a tribunal which it would not otherwise have. In order to succeed in a complaint of unlawful disability discrimination an applicant had to bring himself within the statutory provisions and surmount a number of hurdles. One of those was that it had to be proved that the applicant was a disabled person. In some instances, in the course of preparing for a hearing, a concession could be made by the employer that the applicant was a disabled person. Such a concession had clearly been made in the present case, at a time when the employer was represented by solicitors, and the parties had since then prepared for the hearing on the basis that that issue would not be a matter in dispute as between the parties. That was not a jurisdictional issue but rather an evidential one and there was no error by the chairman in concluding that the employer was bound by that concession and could not apply some six months later to withdraw it. In a letter to the employer's solicitors the chairman had said: "Concession or no concession the tribunal has jurisdiction to hear the applicant's disability discrimination case and the issue of disability will be an issue for the tribunal to decide having heard all the evidence." That accurately described the role of the employment tribunal at the forthcoming hearing. It did not mean that the refusal to allow the employer to withdraw the concession was erroneous.

Ovum Ltd v Tuckett; 17 May 2001; EAT/546/01
EAT: Ms Recorder Cox QC, Mr P R Jacques and Mr J R Rivers

MEDICAL REPORT

On a hearing for directions of an employee's claim of disability discrimination, an employment tribunal chairman directed the employee to disclose to the employer a report she had obtained from her general practitioner. He further directed that the employee would, if required, make herself available for examination by the employer's medical expert, setting out in the order a whole series of matters to be addressed by that expert, and ordered that copies of the expert's report should be filed with the tribunal and served on the employee. The employer sought confirmation that it was only required to disclose the report if disability remained an issue and the employer intended to rely on it. The chairman's reply was that it had to be disclosed in any event, and that the question of legal professional privilege did not apply.

LINDSAY J, dismissing an appeal by the employer on the issue of disclosure, said that the employer, rightly, asserted that legal professional privilege applied to tribunals as it did in civil courts generally. The Civil Procedure Rules 1998 had, however, introduced a rather different regime as to experts' reports. A distinction needed to be drawn between an advisory expert, whom a party consulted privately without any assistance from the court, and whose existence might even be unknown to the other side, and an expert tribunal witness who was instructed as such during the proceedings and whose role was known to the other side from the start. Here the tribunal's assistance had been invoked from the start, and the tribunal had itself specified the questions the expert was to address. The employee would know the identity of the employer's expert. In those circumstances, the nature of the order was such that the report would be a CPR Part 35 expert's report. The duty of the expert would be to the tribunal not simply the payor. That kind of report was not subject to legal privilege. The whole approach of the CPR was for "cards on the table". The employer would see the employee's report from her general practitioner; and, similarly, the employer was required to disclose its report. It might be said that that put the employee in a favoured position. She might have consulted any number of experts and chosen the only one in her favour. That inequality between the parties was capable of being overcome by requiring the employee, at the point of receiving a copy of the report from the employer, to disclose on oath every communication, received within the period beginning six months before the presentation of her originating application, which reported on any of the matters specified in the directions order. If she chose not to reveal any such reports, she would not see the employer's report.

Department of Health v Bird; 17 July 2001; EAT/668/01
EAT: Lindsay J, Mrs T A Marsland and Mr J R Rivers

RACIAL HARASSMENT

An employee who was black regarded as racially offensive a postcard sent to work by a white colleague which depicted a group of bare-breasted black African women with the comment "South Africa's answer to Mayfair". An employment tribunal found that the act of sending the card was race specific and upheld a complaint by the employee against his employer of unlawful race discrimination.

JUDGE PETER CLARK, dismissing an appeal by the employer, said that the employee's complaint was of direct unlawful race discrimination, and, by a combination of sections 1(1)(a) and 4(2)(c) of the Race Relations Act 1976, the employee had to show less favourable treatment on racial grounds that was to his detriment. In some cases—characterised as cases of racial harassment—that statutory process was short-circuited. Racial (or sexual) harassment was not defined by statute. The kind of conduct which constituted such conduct could be and usually was race (or sex) specific. As a practical matter, a true case of racial/sexual harassment would, by its factual nature, encompass the necessary ingredients of less favourable treatment, racial/sexual grounds and detriment. The difficulty arose where the facts did not immediately lead to the conclusion that racial/sexual harassment had occurred. In those circumstances there could be no substitute for the words of the statute. Was the act of sending the postcard so obviously detrimental that it was disadvantageous to the applicant as a black employee by undermining his dignity at work? That question was to be answered by considering a combination of factors: the employee's subjective perception, the motive of the alleged discriminator (the sender of the postcard), how, objectively, the reasonable black employee would react to the treatment complained of and whether he would regard it as being to his detriment. Those factors were not inconsistent with the principle that the discriminator's motive or intention was irrelevant to proof of less favourable treatment on racial grounds, rather that, if bad motive was made out, the applicant's case became so much stronger. The tribunal's conclusion that the case was one of race specific behaviour amounting to unlawful discrimination was a permissible option. Objectively viewed, the postcard with its comment was racially offensive: it landed on the employee's desk with other, white, colleagues laughing; he was genuinely distressed by it; and that was not an over-reaction in the tribunal's view. It passed the racial harassment test.

Chief Constable of the Kent Constabulary v Kufeji; 4 May 2001; EAT/1135/00
EAT: Judge Peter Clark, Ms N Amin and Miss S M Wilson

REVIEW

A chairman promulgated a decision by which he dismissed, on withdrawal by the applicant, her claims for redundancy payment and breach of contract and stated that her claims for unfair dismissal, unpaid wages and insolvency payments remained live. The applicant sought a review of the decision, and the same chairman, sitting alone, allowed the application for a review and went on to confirm his original decision.

HOOPER J, allowing an appeal by the applicant against the review decision, said that the principal issue for resolution was whether the chairman, not having dismissed the review application summarily under rule 11(5) of the Employment Tribunals Rules of Procedure 1993, could himself conduct the review. The chairman, sitting alone, had the jurisdiction to make the original decision, that is to dismiss the claims if they had been withdrawn. Under rule 11(5) he had jurisdiction, sitting alone, to decide whether to dismiss the application for a review on the ground that it had no reasonable prospect of success. It might be thought that, having decided that he would not summarily dismiss the application for review, he would have the right to continue and review the decision, but that was not the case. Although rule 11(6) provided that a review should be heard by the tribunal "which decided the case", which must include the making of a decision as well as the deciding of a case, so far as rule 11(6)(b) was concerned, the decision to dismiss the applicant's claims was a decision made by the chairman acting alone under rule 13(8). It did not appear that the chairman had been specifically appointed by the President or the regional chairman to conduct the review. There was, however, a further difficulty. Rule 13 limited the circumstances in which a chairman acting alone could do any act required or authorised by the Rules to be done by a tribunal. One of the things a chairman sitting alone could not do by virtue of rule 13(8)(c) was to conduct a review of a decision under rule 11(11).

Fox v Willis Howells Financial Services; 1 March 2001; EAT/53/00
EAT: Hooper J, Lord Gladwin of Clee and Mr T C Thomas

REVIEW

An employment tribunal upheld an employee's claim of sex discrimination, preferring the evidence given on her behalf to that from her employers. A tribunal chairman, sitting alone, refused an application by the employer for a review, made on the grounds that new evidence was available and that the interests of justice required it, holding that a review would have no reasonable prospect of success.

NELSON J, allowing an appeal by the employer and remitting the matter of a review for the consideration of the full employment tribunal, said that the appeal was made on the ground, inter alia, that no chairman alone could or should have considered the application himself and concluded, by himself, that the review had no reasonable prospect of success. Rule 11(5) of the Employment Tribunals Rules of Procedure 1993 gave the chairman a very valuable power to act as a filter, to exclude those plain and obvious cases that had no reasonable prospect of success. That was a power that was necessary and that should not be unduly restricted. The only restriction that could be placed on it was that the chairman must exercise it judicially. It was submitted that, in the circumstances of the present case, where there was a factual, and closely contested, dispute that was at the heart of the matter, any decision on a review had to be decided by the whole fact-finding body. Reliance was placed on *Hancock v Middleton* [1982] ICR 416, 419G–H, as indicating that, where there was material which should be investigated, it was appropriate and proper for the matter to go back to the full tribunal for hearing, rather than being dealt with by the chairman alone. The appeal tribunal had to consider whether there was material for the employment tribunal to investigate that was so related to the facts of the case that it should be investigated by the full panel. To say that the whole tribunal should have considered the application to review would not be breaking new ground. It was simply a decision on the facts of a particular case. There had been a closely fought contest on the facts which the tribunal had expressly found difficult to resolve. The key was the fact that the weight to be attached to the new material was difficult for anyone, save the original tribunal, to determine. It was much better determined by them than by the appeal tribunal and should have been determined by them rather than the chairman alone, given that it went to the very heart of the decision that was made.

Tooley v Brimelow; 19 June 2001; EAT/310/00
EAT: Nelson J, Mr D J Hodgkins and Ms B Switzer

CONSTRUCTIVE DISMISSAL

An employee complained to her employers in December 1999 that they had unilaterally altered her job specification. Thereafter she was off work due to stress caused by her work problems and had no contact with her employers until, in June 2000, she resigned because, though well enough to work, she felt unable to face returning to the altered job. An employment tribunal found that she had been constructively dismissed and upheld her complaint of unfair dismissal.

LORD JOHNSTON, dismissing an appeal by the employers, said that the employers submitted that the employee had, by her actions or inaction, affirmed the contract; that affirmation was a question of mixed fact and law; and that, by simply addressing itself to the question of whether it was reasonable for the employee to have delayed resigning, the employment tribunal had not addressed the correct question. It was important to emphasise, on the question of affirmation in the face of a breach of contract justifying repudiation of the contract by the employee, that it was only the employee who could effect affirmation and that it could be done either positively, in the sense of a positive acceptance whether by word or act, or impliedly provided that the conduct of the employee pointed unequivocally to such an acceptance. Delay was obviously a factor in considering whether that had been established, but it was necessary to examine the reasons for that delay in order to determine objectively whether affirmation had in fact been established on an implied basis. In the present case the reason for the employee's illness was, effectively, the circumstances surrounding what the tribunal had categorised as a fundamental breach of contract. The employers neither related the illness to that situation nor took any steps during the period in question to indicate to the employee that they were prepared to address her grievances. Thus, when fit for work, the employee found herself in precisely the same position as she had been in when the breach of contract materialised. Against that background, it was entirely reasonable for the tribunal to conclude that there had been no affirmation by the employee.

Bruce Anchor (Scotland) Ltd v Turbert; 12 September 2001; EAT/455/01
EAT(Sc): Lord Johnston, Mr G R Carter and Ms A E Robertson

CONSTRUCTIVE DISMISSAL

An employment tribunal rejected an employee's claim that by failing to provide her with work to do, in the course of 1999, her employers were in breach of a fundamental term of her contract of employment justifying her resignation on 30 September 1999, and held, on her complaint of unfair dismissal, that she had not been constructively dismissed.

LORD JOHNSTON, dismissing an appeal by the employee, said that the employment tribunal's decision was wholly defective when it came to its reasoning. The appeal tribunal was very conscious of the fact that it must not substitute its own views on the evidence for those of the tribunal which heard the matter and could only deal with errors of law. The appeal tribunal was, however, prepared in the present case, for practical reasons and without setting any precedent, to examine the findings of fact stated by the employment tribunal to determine whether the conclusion to which it came could be supported. In general terms, an issue might well arise as to whether an employer was under a duty to provide work for an employee so long as he was not breaking the employee's contract and continued to pay the employee. Redundancy might arise in a constructive dismissal situation, and a conclusion that the real reason for dismissal was redundancy was not necessarily inconsistent with a finding that the employee was nevertheless constructively dismissed. An employee, however, had no right to redundancy, and the issue of redundancy was peripheral, if not irrelevant, to the basic issue in the present case, namely, whether the conduct of the employer in not offering work to the employee but nevertheless requiring her to remain on the books because they valued her qualifications, was such as to entitle the employee to resign. The test in *Western Excavating (EEC) Ltd v Sharp* [1978] ICR 221 was that, whatever term of the contract was breached, it must in its breach go to the heart of the contract. Whether the matter was looked at from the context of an implied right of an employee to receive work from the employer during the currency of a contract of employment, or from the point of view of a mutual need for trust and confidence, there could be circumstances where the failure to offer work to an employee who was nevertheless being otherwise treated as an employee in terms of her contract could amount to a term capable of breach. The issue was one of degree. Failure to offer an employee work for a considerable period of time or at least without any definite limit of time could amount to a failure on the employer's part properly to perform the contract, thus creating a material breach entitling the employee to resign and claim constructive dismissal. However, on the evidence, the present was not such a case. The employer had an overriding requirement to restructure, to save money. The failure to offer the employee redundancy had probably triggered her resignation. But the time period involved did not amount to a sufficiently material breach, if any, of any obligation on the employer to find work. The employment tribunal, therefore, came to a decision that was tenable on the evidence.

Cerinus v Bell College of Technology; 3 October 2001; EAT/218/01
EAT(Sc): Lord Johnston, Miss S B Ayre and Mr P M Hunter

COSTS

On a pre-hearing review of claims by 13 employees of unlawful deduction of wages, an employment tribunal chairman made an order under rule 7(4) of the Employment Tribunals Rules of Procedure 1993 requiring the applicant employees to pay a deposit of £50 each as a condition of pursuing their claims, on the ground that the claims had little prospect of success. At the substantive hearing of the claims the employment tribunal found against the applicants and, having considered the chairman's reasons for ordering the payment of deposits, made an award of costs under rule 12(7) for the payment of £100 by each applicant.

DOUGLAS BROWN J, allowing an appeal by the applicants against the order for costs, said that it was submitted that the tribunal's reasons for awarding costs did not deal with whether the applicants had behaved unreasonably in conducting the proceedings to a determination; that there had been an ordinary tribunal dispute where there was a conflict of evidence; that the applicants were entitled to know why it was said, if that was the decision, that they had behaved unreasonably; and that it was not sufficient to say that the reasons at the pre-hearing review were substantially similar to the reasons for the tribunal's decision. In the view of the appeal tribunal, the order for costs could not stand. Nowhere in the reasons did it appear that the words of rule 12(7) of the 1993 Rules, in relation to unreasonableness, had been addressed or how the matter had been decided. It was not enough to compare the decision on paper at the pre-hearing review with the decision of a tribunal after oral evidence. It was important to compare the two and to ask if they were substantially the same but it was not decisive of the matter. The question of unreasonableness had to be addressed. If it had been, the tribunal would have been obliged to have regard to its own reasons in dismissing the applications. Nowhere in the reasons was the bringing of the proceedings or the conduct of them criticised. It would be wrong to say, in the circumstances, that the applicants were unreasonable in persisting in bringing their claims. There had been a straightforward conflict of evidence; the result was not inevitable; and it was certainly not unreasonable to pursue the matter to a determination.

Gardiner v VAW Motorcast; 18 July 2001; EAT/262/00
EAT: Douglas Brown J, Mr B Fitzgerald and Mr G H Wright

EMPLOYMENT TRIBUNAL

An employee's claim of unlawful deduction of wages under section 23 of the Employment Rights Act 1996 was directed by an employment tribunal chairman to be heard by a chairman sitting alone in accordance with section 4(3) of the Employment Tribunals Act 1996. A chairman heard oral evidence on disputed facts and dismissed the claim. No reasons were given at the time for the decision that the claim should be heard by a chairman alone, but, after the employee had lodged an appeal, the first chairman said that there had not appeared to him to be a sufficient likelihood of a dispute on the facts to direct a hearing by a full tribunal and the second chairman said that nothing on the face of the pleadings led her to consider that the complaint should be heard by a full tribunal.

DOUGLAS BROWN J, allowing the appeal by the employee, said that in fact the pleadings showed that there was a stark factual conflict between the parties. In *Sogbetun v Hackney London Borough Council* [1998] ICR 1264 Morison J, giving the judgment of the Employment Appeal Tribunal, made a number of significant remarks which formed the clearest guidance as to how chairmen should approach their task under section 4 of the Employment Rights Act 1996. In the present case, both chairmen had fallen into error in not announcing or making known the reasons for their decision and in not seeking the views of the parties, as it was said in *Sogbetun*, at pp 1269D–E, 1270D, that they should. As to whether the first chairman dealt with the statutory requirements so that there was nothing left for the second chairman to do, the better view was that the listing chairman exercised discretion on the material before him, then when the matter came on for hearing there was a continuing duty to review the earlier decision, reflected in the words "at any stage of the proceedings" in section 4(5) of the 1996 Act; and, where the parties turned up with a number of witnesses, that ought to be a clear indication that it was a case where the advantage of a full tribunal should be had: see *Post Office v Howell* [2000] ICR 913, 919C–D.

Clarke v Arriva Kent Thameside Ltd; 25 July 2001; EAT/341/00
EAT: Douglas Brown J, Mr J R Crosby and Mr P R Jacques

PROTECTED DISCLOSURE

A consultant psychiatrist employed by a healthcare trust wrote to a nun employed as a psychiatric social worker because she was concerned that she wore a habit and headdress when visiting patients in the community, and, when a meeting was called by the trust's nursing director to discuss the issue, the consultant spoke to a journalist, getting her views raised publicly in a newspaper article. The consultant's contract was terminated early and it was agreed that the trust would give her a reference. The reference provided set out in detail how she came to leave its employment and concluded that it would not be prepared to re-employ her. She complained to an employment tribunal that, for the purposes of section 47B of the Employment Rights Act 1996, she had been subjected to a detriment on the ground that she had made protected disclosures. The tribunal dismissed the complaint.

DOUGLAS BROWN J, dismissing an appeal by the applicant, said that the issues were whether the disclosures amounted to "qualifying" disclosures within the meaning of section 43B of the 1996 Act, whether, if they did, they had been made in accordance with sections 43C–43H, and whether, if so, the applicant had been subjected to a detriment on the ground that she had made those disclosures. The employment tribunal took the view that the applicant had no reasonable belief that the health and safety of any individual was likely to be endangered and had not, therefore made a "qualifying disclosure". It found that she had an ulterior motive, namely, the appointment of the nun per se, evidenced by a challenge to her competence, and that disclosure to the press was not reasonable in all the circumstances of the case: section 43G(1)(a)(e). The tribunal took into account that the disclosure was made to a journalist rather than a professional body and that the wearing of the habit was not a matter of urgency, as there was no evidence of any complaint or adverse patient reaction. Finally, the tribunal found that the applicant did not suffer a detriment as a result of the disclosure. There was an obligation to provide an accurate reference, and the reason for the contents of the reference was the breakdown in the working relationship between the applicant and members of her team. In other words, there was no causative link between the disclosure to the press and the reference even though it was mentioned in the reference. In the view of the appeal tribunal, the employment tribunal came to a correct conclusion in respect of all those matters. It was clear from the facts found that the applicant's reason for going to the press was for her own protection, largely her good name. Questions of good faith could be safely left to the experience and judgment of the employment tribunal.

Bright v Harrow & Hillingdon Healthcare NHS Trust; 26 July 2001; EAT/115/01
EAT: Douglas Brown J, Lord Davies of Coity and Mr P D Wickens

UNFAIR DISMISSAL

When dismissing an employee's complaint of unfair dismissal, an employment tribunal failed to specify which of several reasons relating to the employee's conduct was the actual reason for dismissal.

JUDGE PETER CLARK, allowing an appeal by the employee, said that it was necessary to set out the steps which an employment tribunal should take when considering the statutory questions raised by section 98 of the Employment Rights Act 1996. (1) What was the employer's reason for dismissal? The reason for dismissal was the reason, or set of facts or beliefs, held by the employer at the time of dismissal, that is on the effective date of termination of the employment. (2) Had the employer shown a potentially fair reason for dismissal? (3) If so, had the employer acted reasonably in treating *that* as a sufficient reason for dismissal? That question had to be determined in accordance with equity and the substantial merits of the case: section 98(4)(b). That question in turn raised a number of issues: (i) in a conduct case, whether the employer had carried out a reasonable investigation and whether he had reasonable grounds for holding an honest belief that the employee was guilty of the conduct alleged; (ii) whether the employer had carried out a reasonable procedure in arriving at the dismissal decision, and, if not, whether the procedural defect had been cured by a subsequent appeal which operated as a rehearing rather than a review of the original dismissal decision; (iii) whether dismissal was within the range of reasonable responses open to the employer, within which issue might arise the questions whether the employee had been treated more severely than other employees in comparable circumstances and whether the employee was or ought to have been aware that his conduct was liable to lead to his dismissal. Adopting those stages of inquiry, (1) there seemed to be three possible reasons for dismissal and it was unclear precisely on which reason the tribunal was judging the reasonableness of the dismissal under section 98(4). That was an essential finding, because it was *that* reason which had to be judged for its reasonableness and no other. (2) The relevant reason was that in the employer's mind at the time of dismissal, and it was accepted that that reason was a genuinely held belief related to the employee's conduct. (3)(i) There was no finding as to what investigation was necessary, bearing in mind the reason for dismissal, and there was no finding as to whether the employer had reasonable ground for his belief that the employee had misconducted himself. That was a material omission. (3)(ii) The question raised and not answered by the tribunal was whether, by upholding the original decision to dismiss for a different reason, the employers' disciplinary panel could be said to have cured a procedural deficiency found by the tribunal. (3)(iii) The tribunal had not addressed the question of reasonable responses at all; and more particularly it had made no findings as to whether cases of other employees were truly comparable or the employee's awareness.

O'Connell v Essex County Fire & Rescue Service; 12 July 2001; EAT/1334/99
EAT: Judge Peter Clark, Sir Gavin Laird and Miss S Wilson

[2001] ICR Part 11

ACADEMIC APPEAL

When her job ceased to exist, an employee who had been employed as a swimming instructor was found work as a classroom helper but paid at the higher rate of pay of a swimming instructor. After a complaint by the employee of unfair dismissal was upheld, the employment tribunal, at a remedies hearing in May 1999, made an order for her to be re-engaged as a primary helper or special needs assistant at the appropriate rate for the post.

NELSON J, dismissing the employee's appeal against the terms of the order, said that at a further remedies hearing the employment tribunal had held that it was not reasonably practicable for the employer to comply with the order for re-engagement and that, because of a failure by the employee to mitigate her loss, she not entitled to any compensation after November 1998. The employer submitted that in the light of that second decision, the time for appealing which was long past, the points raised in the appeal were purely academic. The appeal tribunal was satisfied that there could be no possible benefit to the employee in pursuing the appeal, and it would be inappropriate in such circumstances for it to hear the matter. While the appeal failed on that ground alone, it was necessary, in view of the absence of the employee, to consider her two grounds of appeal: that no reasons were given by the employment tribunal for the order that the employer should cease to continue to employ her in the lower grade post at the higher rate of pay; and that the tribunal erred in awarding arrears of pay for the 20 weeks prior to the hearing at the lower rate of pay. Though it was accepted that the extended reasons might not be as full as they might be, the summary reasons quite clearly stated why the tribunal was making the order. So, that ground of appeal would fall on the merits in any event. As for the second ground, while at first blush *Electronic Data Processing Ltd v Wright* [1986] ICR 76 was applicable, it was readily distinguishable. It was one thing to say that an employee was entitled to carry on in her old job at the old rate of pay until the new job was found, but quite another to say that, where another job had been found and the real unfairness was dismissing the employee rather than allowing her to carry on doing it, the employer should be bound for a considerable period after her actual dismissal to pay her on the basis of the anomalous previous higher rate. On the merits that ground would have failed in any event. The appeal tribunal were satisfied that it had been brought home to the employee that the appeal was solely academic and that an application for costs would be made, but she had nevertheless continued to pursue the matter and made the specific request that it be continued in her absence. In those circumstances, it was appropriate to award costs against her, and she would be ordered to pay £100.

Carter v Tower Hamlets London Borough Council; 22 June 2001; EAT/1073/99
EAT: Nelson J, Mr I Ezekiel and Mrs R A Vickers

DISABILITY DISCRIMINATION

Employers stopped paying sick pay in respect of absences from work for all employees under whose contracts such payments were discretionary. The applicant, who was disabled for the purposes of the Disability Discrimination Act 1995, made a complaint of disability discrimination. An employment tribunal held, inter alia, that payment of sick pay was a reasonable adjustment within section 6 of the 1995 Act and that, in refusing to pay him sick pay when he was off work, the employers had discriminated against the applicant by failing to make a reasonable adjustment contrary to sections 5(2) and 6 of the Act.

MISS RECORDER SLADE QC, when allowing an appeal by the employers on other grounds, said that the employers contended that sick pay was either not within the scope of section 6(1) of the 1995 Act or was excluded by section 6(11). Section 6 plainly applied to monetary benefits as well as to other arrangements. Were that not so there would have been no need for section 6(11). That provision excluded from the application of section 6 any benefit under an occupational pension scheme and other benefits payable in money or money's worth under a scheme or arrangement for the benefit of employees in respect of specified events including sickness. Further, regulation 3(2) of the Disability Discrimination (Employment) Regulations 1996 clearly contemplated that financial benefits fell within section 6. The natural meaning of "scheme or arrangement for the benefit of employees" in section 6(11) did not include payment of sick pay by an employer to an employee under a contract of employment. Such payments were made by the employer to, rather than "for the benefit of", the employee. Further, they were made pursuant to the contract of employment, rather than "under an arrangement". Section 6(7) did not preclude a finding which would require the payment of sick pay to the applicant, since the provision that "nothing in this Part is to be taken to require an employer to treat a disabled person more favourably" than others was made "subject to the provisions of this section". Thus the section 6(1) duty prevailed over section 6(7).

London Clubs Management Ltd v Hood; 18 September 2001; EAT/184/00
EAT: Miss Recorder Slade QC, Mr D J Hodgkins and Mr P M Smith

ILLEGAL CONTRACT

An employment tribunal declined jurisdiction to hear an employee's complaint of unfair dismissal on the ground that the employee had agreed to a contract that was tainted by illegality.

JUDGE ALTMAN, allowing an appeal by the employee, said that the employment tribunal of their own motion, quite properly, took the issue of whether the employee's contract of employment was legal, as the evidence seemed to indicate that he had received his pay without the employers accounting to the Inland Revenue for tax or National Insurance. The extent to which an employee was to be fixed with the illegality of a contract, so as to be disentitled from bringing any claim upon it, was a matter that had been considered many times by the courts. Knowledge of the ingredients might not necessarily give rise to knowledge that the Inland Revenue were being deprived or misled, particularly where the employee was receiving no more than he was entitled to. The employment tribunal, in setting out the principles of law, appeared to have attributed to the employee the burden of establishing lack of knowledge. It was not for the employee to show that he had no knowledge of the alleged illegality. The issue for the tribunal, if the matter was raised of their own motion, was whether they were satisfied that the employee did know of the illegality. It was clear that if the employee did not know of the illegality then he was entitled to rely on the contract. It was not so much whether the employee agreed to a contract as to whether he agreed to and knew about the illegality, and it appeared, on the face of their conclusions, that the employment tribunal had concluded that the fact of the improper amount being paid was sufficient to disentitle the applicant employee. If a party was to be disentitled from pursuing his normal statutory right to have his claim for unfair dismissal heard, on an important issue of legality, it was essential that the decision of the tribunal could be seen clearly in the face of the established legal principles. The issue would be remitted for rehearing.

Gyaniao v Design Corner Ltd; 15 June 2001; EAT/204/01
EAT: Judge Altman, Mr W Morris and Mrs D M Palmer

PRACTICE

An applicant's particulars of complaint stated that she had not been paid any redundancy money and notice or holiday pay by her former employer. The employer sent a fax to the tribunal saying that his business had closed and his only income was income support. The applicant faxed the tribunal from Greece, saying that the employer had not spoken to the Department of Trade & Industry and as a result they presumed he did not agree that she was entitled to redundancy money, and she asked the tribunal to fax her back if there would be a problem if she did not attend the hearing. The tribunal did not reply. Neither party attended the hearing and the complaint was dismissed on the ground that the IT1 did not give any substantive details in support of the claim.

JUDGE PETER CLARK, allowing an appeal by the applicant, said that, in dismissing the applicant's originating application, the employment tribunal fell into error in a number of respects. (1) It did not, on the face of the full reasons, consider adjourning the hearing. (2) If it did, then it failed to exercise its discretion judicially in circumstances where the applicant had faxed the tribunal the previous day, explaining the reason for her absence and inviting a response. She ought to have been advised of her right to seek an adjournment. (3) In not granting an adjournment the tribunal failed to take into account a relevant factor, namely, that the respondent having failed to enter an appearance no injustice would have been caused by granting an adjournment. (4) In the proper exercise of its discretion the tribunal ought to have granted an adjournment in the circumstances of the case. (5) The tribunal, before dismissing the application, was required to consider the originating material and any written representations. On the material before it (a) the applicant claimed she had been employed by the respondent for seven years and had been dismissed in circumstances amounting to redundancy without a redundancy payment; (b) the respondent had not entered an appearance, nor had he disputed the claim; (c) the applicant had not been asked for further particulars of her claim, either by the respondent or by the tribunal of its own motion. The claim had been accepted. In those circumstances no reasonable tribunal, properly directing itself, could dismiss the application. The case would be remitted for rehearing and the applicant directed to serve full particulars of her claims.

Mills v Johnson; 19 July 2001; EAT/1107/00
EAT: Judge Peter Clark, Mr J R Crosby and Mr D A C Lambert

REDUNDANCY

A part-time teacher, who was told that her teaching hours were to be substantially reduced because of cuts in part-time teaching posts, though the teaching hours for her particular subject were to remain the same, was held by an employment tribunal to have been fairly dismissed by reason of redundancy.

MR RECORDER LANGSTAFF QC, allowing an appeal by the employee, said that by virtue of section 139(1)(b) of the Employment Rights Act 1996 an employee was to be taken to be dismissed by reason of redundancy if the dismissal was wholly or mainly attributable to "the fact that the requirements of that business . . . for employees to carry out work of a particular kind . . . have ceased or diminished . . ." Though there was no specific requirement in the 1996 Act for there to be any consultation in respect of redundancy, it was well recognised that determination of whether a dismissal was fair was likely to turn significantly on the question of whether there had been sufficient consultation. The employee argued, first, that there was no redundancy; that there had been no reduction in the requirements for work "of a particular kind"; and that those words could not mean simply teaching but must mean teaching of her subject. The employment tribunal had not expressly said what constituted "work of a particular kind". To determine whether that was necessary required resolution of the question whether the work referred to in the statute was that of the employee who was dismissed as being redundant. In other words, if an employer found that he no longer required employees to perform task A, and because of that dismisses employees engaged on task B, was the dismissal of the latter by reason of redundancy? Untrammelled by authority, the appeal tribunal would conclude that the wording of the statute envisaged that the "work of a particular kind" did not necessarily have to be work of the sort which the dismissed employee had been doing. Any potential unfairness that might arise in a "bumping" situation would be resolved by section 98(4) of the Act. *Murray v Foyle Meats Ltd* [1999] ICR 827 emphasised that the language of section 139(1)(b) was simplicity itself. It asked two questions of fact: (1) whether one or another of various states of economic affairs existed and (2) whether the dismissal was attributable, wholly or mainly, to that state of affairs. That was a question of causation. It followed that if the tribunal found as a fact that the requirements of the employer's business for employees to carry out work of a particular kind (part-time teaching) had ceased or diminished, and if they found as a fact that it was by reason of that reduction in requirement that the employee was dismissed, they had asked themselves all the questions the statute required. They did not need to go further to ask whether the reduction in the requirement of the employer was for work of the particular kind which the employee herself did. Whether her dismissal was fair, however, depended on what the employment tribunal made of the consultation process, and the tribunal's view that the employer had warned the employee of the possibility of reductions in working hours, and consequent redundancy, which appeared to have been material in assessing fairness, was erroneous. The decision on fairness could not stand and the matter would be remitted for reconsideration.

Stankovic v City of Westminster; 17 October 2001; EAT/696/00
EAT: Mr Recorder Langstaff QC, Mr J R Crosby and Lord Gladwin of Clee

TIME WORK

An employment tribunal held that employees of an organisation which supplied nurses on a 24-hour emergency basis were workers engaged in time work, in accordance with regulation 15(1) of the National Minimum Wage Regulations 1999, when they were awake and waiting to deal with calls at home during night time hours.

JUDGE ALTMAN, dismissing an appeal by the employer, said that, referring to *Sindicato de Medicos de Asistencia Publica v Conselleria de Sanidad y Consumo de la Generalidad Valenciana* (Case C-303/98) [2001] ICR 1116, the employer argued that where a worker was employed at home, it was unrealistic to suggest that, merely because he was available to do the tasks to which he had been assigned by his employer, that was being at work. The appeal tribunal had some sympathy with that argument. There did seem to be a qualitative difference between doing assigned tasks while at home and doing assigned tasks while at work. The essential task of a tribunal in seeking to apply the Regulations, or an employer in seeking to adhere to them, was to look at the ingredients of the particular case and the type of work involved to see if they could properly be described as work. In the present case the types of thing to be looked at were the nature of the work in its substance; the extent to which the employee's activities were restricted when not actually answering the telephone; the way in which the parties approached their mutual obligations and the way remuneration was calculated were not conclusive but where pay was calculated by reference to a shift that provided some illustration of the nature of the obligation; and the extent to which the period during which work was performed was readily ascertainable. In the present case the employee, while working at home, was not able to pick and choose the periods of time during the night when he would answer the telephone; there was a continuing obligation to be available throughout the night, and that was an important element in considering what was work. The variable nature of the number of telephone calls, wholly unrelated to the pay that was involved, also tended to dissociate the actual periods of answering the telephone from the measurement of the hours of work. On the facts found, the employment tribunal were entitled to conclude that the employees were working. To extract from the night time hours those few minutes when each phone call took place and say that that was work but that the rest was not was really only selecting one type of work in preference to another, by reference to the degree of concentration required. In the context of the facts, there was only a degree of difference between holding oneself ready and obliged to answer the telephone and actually doing so.

British Nursing Association v Inland Revenue; 8 June 2001; EAT/1387/00
EAT: Judge Altman, Mr D A C Lambert and Mr P A L Parker

COMPENSATION

An employment tribunal found that, although the applicant had been dismissed for redundancy, the dismissal was unfair because of there had been no consultation prior to the redundancy. It concluded that, had proper consultation taken place, he would have been employed for a further two weeks and it awarded him two weeks' wages as compensation.

JUDGE REID QC, allowing an appeal by the applicant, said that the applicant first argued that there should have been a finding that the dismissal was unfair, not simply for lack of consultation, but also because there should have been a warning of his impending redundancy seven months earlier when the employer knew it was inevitable so that he could have looked for alternative employment. In looking at compensation, where a dismissal was unfair by reason of an employer's failure to go through the appropriate steps before making an employee redundant, the tribunal was not put in any form of straitjacket. Under section 123 of the Employment Rights Act 1996 it had to look at what was just and equitable in all the circumstances. In order to do that in the present case, one had to see if there was a separate duty to warn apart from the duty to consult. Looking at the passages cited in support, in *Rowell v Hubbard Group Services Ltd* [1995] IRLR 195, *Williams v Compair Maxam Ltd* [1982] ICR 156 and *Polkey v A E Dayton Services Ltd* [1988] ICR 142, 162–163, the proposition that there was a separate duty to warn was not made out. Warning and consultation were part of the single process of consultation which began with the employee being given notice that he was at risk. The second ground of appeal was that, in awarding only two weeks' wages, the tribunal incorrectly applied the process for assessing compensatory awards. Although, as the employment tribunal found, the consultation process would not have taken more than two weeks, it did not follow that that process should be taken to have started at the date of dismissal, nor did it follow that the appropriate method of calculating compensation was by assuming that, had a consultation process started on the date of dismissal, the applicant would have been employed for a further two weeks. The reason for the unfairness was the failure to start the consultation process timeously or at all, with the result that he was disadvantaged in seeking another job. In the judgment of the appeal tribunal, he could have started that process 10 weeks earlier and, had he done so, was likely to have had a new job substantially earlier. The employment tribunal had allowed itself to be forced into a straitjacket by what had become a conventional method of expressing the compensation payable in non consultation redundancy cases where the court had held that, had the employer acted properly, the employee would have had a further two weeks' tenure and that that was the measure of his loss. It had to be remembered that the award under section 123 was to be calculated on a more general basis. The applicant lost the chance of being re-employed substantially earlier than he was and the appropriate measure of compensation (in the absence of evidence as to his pay in his new job) was 10 weeks' wages.

Elkouil v Coney Island Ltd; 30 October 2001; EAT/520/00
EAT: Judge J R Reid QC, Mr P R A Jacques and Mr J C Shrigley

COMPENSATION

After 30 years' employment, an employee was selected for early retirement and received a lump sum of £151,474 under the employer's early retirement scheme, the purpose of which was "to provide a superannuation gratuity to participants in respect of past service with the company" and which stated that it conferred "no contractual or other rights or entitlements on any employee". An employment tribunal upheld a complaint by the employee that he had been unfairly dismissed and directed that the employer should be given credit for the payment made to the employee under the early retirement scheme.

JUDGE REID QC, dismissing an appeal by the employee, said that the employee submitted that the sum paid under the scheme should be considered to be a contractual entitlement, which should be left out of account, because it would have been irrational or perverse not to have awarded him the sum. But the words of the scheme itself were paramount and clear; the scheme was, as it said it was and as the employment tribunal concluded, discretionary, the fact that payments under it were described as "pension" being neither here nor there. The cases relating to the taking into account of pensions in personal injury cases were not of assistance, because what one was concerned with in the present case was a statutory compensation scheme not a claim for damages at common law. The requirement in section 123 of the Employment Rights Act 1996 was to determine "such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer". The decision as to whether the payment ought to be taken into account was one for the employment tribunal and there was no error of law in their doing so. Further, they were correct to do so. It was a non contractual payment which would not have arisen but for the employee's dismissal, and the loss he suffered was undoubtedly diminished by the payment. Though the extent of that loss might be affected by the taxation treatment of the sum received, that was a question of the quantum to be taken into account; but the tribunal were right, as a matter of justice and equity, to take into account a payment under the scheme in determining compensation.

Hodes v Marks & Spencer plc; 1 November 2001; EAT/716/00
EAT: Judge J R Reid QC, Mr H Singh and Mr R N Straker

DISABILITY DISCRIMINATION

After nearly 40 years working for his employer, an employee who was profoundly deaf and unable to speak, and who communicated through people who knew him well, was selected for redundancy with six others. Rejecting his claim of disability discrimination, an employment tribunal found that the employee had had the greatest difficulty in understanding the situation when he was told he was being dismissed and had been bitterly distressed at losing his job, but that the cause of his distress was the loss of employment and not any perception that he was suffering from discrimination.

JUDGE REID QC, allowing an appeal by the employee, said that the argument advanced on behalf of the employee was that his selection for redundancy was less favourable treatment within the meaning of section 5(1) of the Disability Discrimination Act 1995 because he was marked down in certain categories because of his disability; alternatively, that the selection criteria placed him at a substantial disadvantage in comparison with non disabled employees so that the employer's failure to adjust them to remove the disadvantage was a breach of section 5(2). The employment tribunal said that, even if he had been marked up to an average mark in the relevant categories, he would still have been one of those made redundant and, therefore, he had not been treated less favourably for a reason relating to his disability. But the position was that the employee was put under a disadvantage because, in relation to the specific categories, his disability affected his marks in a way that it did not affect the marks of those who were not suffering from a disability and because no steps were taken to make any adjustment to take account of the detriment he suffered by being marked down. Accordingly, the tribunal was wrong in holding that there was no discrimination against the employee. There was no suggestion that it would have been impractical to deal with the detriment by some appropriate marking uplift. That said, the fact of the matter was that the employee would, as the tribunal found, have been selected in any event for redundancy. In those circumstances, the appropriate response was to make a declaration that, by applying the criteria it did, the employer discriminated against the employee on the basis of his disability. The second issue in the appeal related to the failure of the employer to take account of the employee's disability in the manner he was informed of his dismissal. The position was that he was not afforded any special treatment. He was, with the others dismissed, told of his dismissal at a single meeting. The tribunal was in error in saying that there was no detriment suffered. It was unlawful for an employer to discriminate against a disabled person whom he employed "by dismissing him or subjecting him to any other detriment", and there was a detriment in bringing a profoundly deaf person in with a group of others who can hear and dismissing him in circumstances where he had difficulty in comprehending what was going on. It was something that could easily have been dealt with by an appropriate adjustment. But it was not a case where it could be said that there had been an injury to feelings by reason of the discrimination and, again, the appropriate remedy was simply to make a declaration.

Berry v GB Electronics Ltd; 17 October 2001; EAT/882/00
EAT: Judge J R Reid QC, Mr A E R Manners and Mr A D Tuffin

EXTENSION OF TIME

An employer presented its notice of appearance to an employee's complaint of unfair dismissal, a month out of time, on the day before that fixed for the hearing. The employment tribunal refused the employer's application for an extension of time, on the ground that the employer had simply not bothered to give the matter any attention until made aware of the hearing, and the tribunal went on to uphold the employee's complaint.

MR RECORDER UNDERHILL QC, allowing an appeal by the employer, said that the essential ground of appeal was that the tribunal had failed to follow the guidance given by the appeal tribunal in *Kwik Save Stores Ltd v Swain* [1997] ICR 49, 54–55, where Mummery J set out the factors to which an employment tribunal ought to have regard in considering an application for an extension of time for entering a notice of appearance. Mummery J pointed out that the length of, and explanation for, the delay would always be an important factor and might be decisive, but also pointed out that it was not the only factor to be considered. The employment tribunal had not approached the exercise of its discretion in accordance with those guidelines and had only considered the first of the factors identified. It had not addressed the question of prejudice or, therefore, the apparent merits of the employee's claim and employer's defence. It followed that its decision was flawed. It was submitted that the guidance in *Kwik Save Stores* was no longer authoritative because, since it was decided, the time for service of a notice of appearance had been extended from 14 to 21 days, but a modest increase in the period allowed could not have affected the questions of principle reviewed in *Kwik Save Stores*. The appeal tribunal had come to the conclusion that it was not possible to say, in the circumstances of the case, that the employment tribunal could legitimately only have exercised its discretion against the employer and, accordingly, it was obliged to remit the application to the employment tribunal for reconsideration. In considering the issue of prejudice, the tribunal could take into account the fact that any award against the employer would [as the tribunal had found] be subject to a very substantial reduction for contributory conduct.

Polygon Corporation v Tregunna; 14 November 2001; EAT/1194/00
EAT: Mr Recorder Underhill QC, Mrs A Gallico and Mrs T A Marsland

PRACTICE

An employment tribunal, upholding complaints by two employees that they had been unfairly dismissed for asserting that their employer had infringed a statutory right, had regard in its reasons to three unreported cases, which had not been cited by the parties' advocates and on which they had not had any opportunity to comment.

JUDGE SEROTA QC, allowing an appeal by the employer, said that, had the three authorities been considered by the advocates, their submissions might have focused on the relevant evidence and the findings of fact that the tribunal should have made. It was not possible to say what the decision might have been in those circumstances. The right to a fair hearing required notice of all material matters of fact and law to be given to the parties if the employment tribunal wished to make determinations on points not argued by the parties. The consideration of the three authorities by the employment tribunal had been material to its decision, since, even though no complaint was made as to the principle to be deduced from them, the application of the principle to the facts had been highly material. Where an employment tribunal considered that an authority was relevant, significant and material to its decision, but had not been referred to by the parties, it should refer that authority to the parties and invite their submissions before concluding its decision. That was more than mere good practice. Failure to do so might amount to a breach of natural justice and of the right to a fair hearing. The failure of the employment tribunal to invite submissions from the parties on the three authorities had doubtless been inadvertent. The tribunal might not have recognised the particular significance it attached to the authorities. There had, however, been significant procedural unfairness and the matter would be remitted to enable the employment tribunal to hear submissions on the three authorities and on any findings of fact that either party might wish the tribunal to make in determining the question in issue. Even though it would have been open to the employer to seek a review of the tribunal's decision, its failure to do so did not preclude its right to appeal.

Albion Hotel (Freshwater) Ltd v Silva; 15 November 2001; EAT/375/00
EAT: Judge D Serota QC, Lord Davies of Coity and Mr I Ezekiel

PRACTICE

Following her resignation from her employment, an employee applied to an employment tribunal for one week's pay in hand and two days' holiday pay for the year 1999 to 2000, to which she claimed to be entitled. The tribunal dismissed both claims but went on to award her three weeks' holiday pay for the year 1998 to 1999.

JUDGE PETER CLARK, allowing an appeal by the employer, said that the Employment Appeal Tribunal had adjourned the preliminary hearing of the appeal on terms that the employer produce certain PAYE records. The employer had complied with that direction, and the employee had written to say that she had been surprised by the award as she had not applied for holiday pay for the previous year as she could not prove either way whether she had been paid it. It was clear that both parties had been surprised by the award of three weeks' holiday pay for a period in respect of which no claim had been made. It was essential if an employment tribunal was to raise a claim not advanced by an applicant that both parties, particularly the respondent, were given a proper opportunity to deal with it both in evidence and in argument. In the circumstances of the present case there had been a breach of natural justice that required the appeal to be allowed and the employment tribunal's award to be set aside. The question then arose as to what should be done. Bearing in mind the principle of proportionality—the award was just under £400—and that, on the material before the appeal tribunal, it appeared that the applicant had received all the holiday pay to which she was entitled for the year 1998 to 1999, the case would not be remitted; instead, the originating application would be dismissed.

Phoenix Catering Ltd v Mayers; 19 October 2001; EAT/302/01
EAT: Judge Peter Clark, Mrs R A Vickers and Mr G H Wright

PRACTICE

In 1997 Companies House advertised internally for a registrar of companies for Anguilla, pursuant to an agreement with the Department of International Development. Two employees applied for the post and, in August 1997, the unsuccessful applicant made a complaint of racial discrimination and victimisation against Companies House and the department. By a decision, on a preliminary issue as to jurisdiction, sent to the parties on 6 February 1998, the industrial tribunal held it had no jurisdiction, because (i) a person posted abroad would not be a person employed at an establishment in Great Britain for the purposes of the Race Relations Act 1976, and (ii) the interview panel, which consisted of the director of financial services in Anguilla, a Foreign Office official and a senior officer in the Department of Trade and Industry, were not employees or agents of Companies House. The applicant appealed and his complaints were remitted for a fresh preliminary hearing, at which, by reasons dated 12 April 2000, the employment tribunal decided that the decision not to select the applicant was not treatment by Companies House within the 1976 Act, but, if it was, the tribunal would have jurisdiction.

DOUGLAS BROWN J, allowing an appeal by the applicant, said that the applicant had submitted to the tribunal that, where a benefit in the form of secondment was afforded to an employee, the employer would be liable for refusing such benefit on racial grounds by reason of section 4(2) of the 1976 Act and an employer could not avoid the reach of section 4 by outsourcing its decision-making. It was submitted, alternatively, that the interview panel were acting as agents for the employer during the selection process. The employment tribunal had made detailed findings of fact as to how the suitable person for secondment had been selected and come to the conclusion that the employer was not responsible, that its role was confined to providing nominees for secondment. Nowhere in the reasons was there any consideration of counsel's arguments, particularly on the issues of vicarious liability, liability for the acts of third parties or agency. It was accepted that those were fundamental issues that needed to be addressed. Looking at the tribunal's reasons, it was not possible to tell what view the tribunal formed of those arguments. That failure represented a serious flaw in the decision-making process, and the decision could not stand. The application was now very stale. If the preliminary issue was heard again a final resolution would be two or three years away. There was going to be a full hearing on the victimisation issue in any event. The most expeditious method of dealing with the application was for all matters to be dealt with at the one hearing and the case would be remitted accordingly.

Willie v Companies House; 3 August 2001; EAT/652/00
EAT: Douglas Brown J, Mrs A Gallico and Mr P R A Jacques

AMENDMENT

At the hearing of an employee's complaints of unfair dismissal and race discrimination, the employment tribunal ruled that it would hear evidence on the merits of the complaints as well as on proposed amendments submitted by the applicant before deciding on the admissibility of the amendments and whether, if necessary, to extend time to amend the originating application to add further allegations of discrimination. The tribunal went on to find in the applicant's favour on the race discrimination claims, but found that he had not been unfairly dismissed, and, while rejecting some of the amendments, extended time to allow an amendment in relation to a disciplinary process on the ground that the employers would not be prejudiced as the matter was well documented.

JUDGE SEROTA QC, allowing an appeal by the employers, said that the employers submitted that the tribunal had only considered questions of prejudice in deciding to permit the amendments, and a number of factors had been submitted to the tribunal as being relevant to that decision. The employment tribunal was not wrong in exercising its discretion to decide to hear evidence on the merits of the case generally as well as evidence relating to the proposed amendments and then to rule on admissibility later. Nevertheless the fact that the tribunal heard evidence on the substance of the complaint and concluded that the applicant had been treated badly might have blinded it to the need to consider other circumstances which were or might have been relevant to the application to amend. While guidance given in *British Coal Corpn v Keeble* [1997] IRLR 336 should not be regarded as statutory guidance and it would be wrong to seek to cut down the wide discretion given to tribunals to consider all the circumstances and reach decisions which were just and equitable, the approach of the appeal tribunal in that case was sensible guidance. It required tribunals to focus on *all* the circumstances of the case, a number of which required specific consideration, including the length of delay, the reasons for the delay and whether those reasons were good. There was a growing recognition of the importance of parties adhering to time limits, and, while failure to comply with a time limit without good reason was not necessarily of itself a reason to refuse to extend time, the tribunal had apparently failed to have regard to the delay, the reasons for the delay and the fact that there appeared to have been a conscious decision by the applicant to take no action despite having received legal advice. It might well be that the applicant would be in a position to provide a satisfactory explanation which would enable the tribunal to exercise discretion in his favour. However, it seemed that the tribunal was in error in concentrating on the question of prejudice alone. The appropriate course was for the matter to be remitted to be heard by another tribunal.

Direct Line Accident Management Ltd v Zaidi; 25 September 2001; EAT/384/00
EAT: Judge D Serota QC, Mr W Morris and Mrs D M Palmer

CONTEMPT

In the course of preparing an appeal against a decision of an employment tribunal, the applicant produced a document, described by his then solicitors, as "our client's transcript of part of the original tribunal hearing". The employment tribunal upheld the respondent's contention that the document was a transcript of an unauthorised tape recording of the proceedings and a contempt of court under section 9 of the Contempt of Court Act 1981. When no explanation whatsoever was given by the applicant as to how the document came into existence, the employment tribunal concluded that the making of the recording was scandalous conduct, and exercised its discretion to strike out the proceedings.

JUDGE PUGSLEY, dismissing an appeal by the applicant, said that, as a general proposition, it would not be right to strike out a case because someone had taped part of the proceedings. However, where, as in the present case, there was an obdurate refusal to explain what had happened, to admit it on overwhelming evidence, it was well within the discretion of a tribunal to take the course of striking out. The employment tribunal, in other parts of their reasons, had taken a robust view of allegations made against chairmen in their area and not struck out the applicant's case. But, faced as they were with remorseless and inexorable evasiveness on what was clearly a transcript, they were entitled to take into account not only that a transcript had been made by a tape recorder but the applicant's total refusal to accept or apologise for that. The refusal to provide an explanation for a prima facie breach of section 9 of the Contempt of Court Act 1981 was so unreasonable that the claim could have been struck out perfectly properly on that basis in any event. The appeal would be dismissed on that basis, and only if that decision were to be reversed on appeal would the following issue arise. The employment tribunal had considered that a victimisation claim advanced by the applicant was indistinguishable from that in *D'Souza v Lambeth London Borough Council* [2001] EWCA Civ 794, where the Court of Appeal had concluded that an employment tribunal had had no jurisdiction to consider a claim by a former employee alleging discrimination in non compliance with an order for reinstatement. The appeal tribunal had been informed that leave to appeal to the House of Lords had been received in *D'Souza*'s case. It would be appropriate to stay the appeal on that issue until the House of Lords had given judgment in *D'Souza*. It would be quite wrong for the appeal tribunal prematurely to seek to resolve an issue when there was a real possibility that the House of Lords would give a definitive judgment on it.

Neckles v Yorkshire Rider Ltd; 18 January 2002; EAT/1267/01
EAT: Judge Pugsley, Mrs R Chapman and Mr P R A Jacques

DISABILITY DISCRIMINATION

An employment tribunal found that a disabled employee had not been unlawfully discriminated against when he was dismissed for prolonged absence from work. The tribunal found that the employer had demonstrated a genuine willingness to consider various options that might assist the employee in returning to work, but that he was not fit to return to work and there was no suggestion when he might be likely to do so and that the dismissal was justified under section 5(3) of the Disability Discrimination Act 1995.

LORD JOHNSTON, dismissing an appeal by the employee, said that section 5(3) of the 1995 Act required the tribunal to be satisfied that the reasons for the discriminatory act being justified were both material and substantial in the circumstances. There was a useful analysis of the section by Arden LJ in *Post Office v Jones* [2001] ICR 805: there had to be a causal connection between the discriminatory act and the justifying circumstances which had to be material in the sense of relevant, while substantial meant simply more than de minimis. It was important to note from *Jones's* case that the justification need not depend on the tribunal being satisfied that all possible protection had been given to the employee. It was also important to note, given that the discriminatory act related to how the employer treated the employee, that knowledge of disability was not necessarily an essential element. In so far as the appeal tribunal might have suggested in *Quinn v Schwarzkopf Ltd* [2001] IRLR 67 that justification could never occur if the employer was ignorant of the fact of disability at the relevant time, that went too far. What mattered was to analyse the treatment meted out by the employer. The reason for the dismissal in the present case, as far as the employer was concerned, was the sickness record, failure to respond by correct reporting procedures and, more importantly, the failure substantially to respond to the employer's various attempts to try and accommodate the employee in retaining his employment. It was also very important to bear in mind that at the time of dismissal the employee was not fit for work, nor was it known when he was likely to be so. In those circumstances, the tribunal reached a correct decision. The reasons for dismissal were both material and substantial and directly related to the dismissal.

Callagan v Glasgow City Council; 11 September 2001; EAT/43/01
EAT(Sc): Lord Johnston, Miss S B Ayre and Miss A Martin

REVIEW

In October 1995 at a pre-hearing review of an applicant's sex discrimination complaint, an industrial tribunal chairman ordered the applicant to pay a deposit of £100 as a condition of being permitted to continue. In November 1995 the chairman refused to review his decision and, in December 1995, struck out the complaint, the applicant having failed to pay the deposit. Appeals by the applicant against the deposit and striking out decisions were rejected by the appeal tribunal, but in April 1997 the President of the appeal tribunal directed him to apply to the industrial tribunal to consider his new evidence and review the deposit order. In May 1997 the tribunal chairman refused to review his deposit decision of October 1995 on the ground that the proceedings had been struck out, his order to that effect having been upheld by the appeal tribunal, and the tribunal was functus officio.

MAURICE KAY J, dismissing an appeal by the applicant against the chairman's refusal to review of May 1997, said that it was abundantly clear that an order for a deposit under rule 7(4) in Schedule 1 to the Employment Tribunals (Constitution and Procedure) Regulations 1993 was not susceptible to review under rule 11, which provided the general power of review, because rule 11 only applied to a "decision" and the definition of "decision" in regulation 2 of the 1993 Regulations expressly excluded "any other interlocutory order or any other decision on an interlocutory matter". On the other hand there was a line of authority to the effect that, in some circumstances, a deposit decision was susceptible of review under rule 16(1). It was the applicant's case that it remained open to the employment tribunal to review the deposit decision on the basis of a material change in the factual circumstances even after the strike out which had been subsequently upheld on appeal: *Kuttapan v Croydon London Borough Council* [1999] IRLR 349. The position was, however, that, the strike out order having been *lawfully* made, there was no jurisdiction in the employment tribunal to revisit the deposit order pursuant to the Regulations. Rule 16 was not a gateway to "directions on any matter arising in connection with" proceedings which had long since been the subject of a lawful strike out order. That was the difference between the present case and *Kuttapan*, in which the strike out order had been wrongly made. The respondent employers were correct in submitting that the tribunal chairman was right to decide that he was functus officio: the employment tribunal had no jurisdiction to consider reviewing the deposit decision, since it was compelled to regard its decision on the strike out as exhausting its jurisdiction to hear applications in respect of the applicant's complaint: *Aparau v Iceland Frozen Foods plc* [2000] ICR 341, 350.

Armstrong v Devon County Council; 16 January 2002; EAT/484/96
EAT: Maurice Kay J, Mrs R Chapman and Lord Gladwin of Clee

SEX DISCRIMINATION

An employers' staff code for male employees forbade long hair and pony tails, whereas female staff were required only to be neatly groomed. An employment tribunal dismissed a complaint of sex discrimination by a male employee, holding that the requirement was one of conventionality of appearance and that the treatment accorded to male employees was not less favourable than that accorded to female employees.

MR RECORDER LANGSTAFF QC, dismissing an appeal by the employee, said that the central issue between the parties was whether or not the tribunal drew any conclusion as to whether the length of hair or the wearing of a pony tail was within the bounds of what was unconventional. Although the tribunal had not said so in terms, it was implicit in its decision. In looking at a dress standard a tribunal had first to ask whether or not there was a contractual requirement for the standard. Secondly, it had to ask, so far as discrimination on the ground of sex was concerned, whether taken as a whole the dress code was discriminatory in that the treatment accorded to male employees was less favourable than that accorded to females, or the reverse. As part of that question, the tribunal had inevitably to examine the particular constituent elements of the dress code. That was not to say that men and women had to be treated identically if there was to be no discrimination. It was for the tribunal to decide the scope of its inquiry, but if the tribunal was examining a dress code as a whole it would inevitably wish to view the component parts in order properly to assess the whole. That was no more than saying, in different words, what was said by Phillips LJ in *Smith v Safeway plc* [1996] ICR 868, 876, which was binding on the appeal tribunal.

Fuller v Mastercare Service & Distribution; 24 September 2001; EAT/707/00
EAT: Mr Recorder Langstaff QC, Mr P Dawson and Mr B V Fitzgerald

STATUS OF EXECUTORS

An employment tribunal sitting in Scotland held that it had no jurisdiction to hear complaints of breach of contract and disability discrimination brought by the executors of a deceased claimant on the ground that there was no statutory equivalent to section 1(1) of the Law Reform (Miscellaneous Provisions) Act 1934, which enabled personal representatives in England and Wales to bring such complaints, applicable in Scotland.

LORD JOHNSTON, allowing an appeal by the executors, said that the common law of Scotland had for centuries admitted the right of an executor to pursue claims on behalf of the deceased with some exceptions. The question was whether the discrimination statutes provided one of those exceptions. The appeal tribunal was, therefore, required to search the statute to discover whether that was the case. The shoe pinched tightest with regard to the use of the word "person" [who could bring a complaint] in section 8 of the Disability Discrimination Act 1995 such as was referred to by Stuart-Smith LJ in *Lewisham and Guys Mental Health NHS Trust v Andrews (decd)* [2000] ICR 707, para 20, but the overriding consideration was that an executor was deemed to be the person whom he represented, i e the deceased, and thus the claim being brought by the executor was effectively being brought by the person in question. The 1934 Act was of no relevance, it having been necessary to remove an obstacle existing in the common law of England which did not exist in Scotland, and it was highly significant that the 1934 Act had not been translated into the Scottish jurisdiction, the reason being that it was unnecessary. There was no reason or provision in the statute which precluded an executor from bringing a claim for disability discrimination; and, a fortiori, he was entitled to bring a claim for breach of contract.

Executors of the late Gary Soutar v James Murray & Co (Cupar) Ltd; 7 November 2001; EAT/592/01
EAT(Sc): Lord Johnston, Dr A H Bridge and Mr P M Hunter

WAGES

An employment tribunal found that an essential car user's allowance paid to an employee by his employers fell within the definition of "wages" in section 27(1)(a) of the Employment Rights Act 1996 and was not a "payment in respect of expenses" for the purposes of section 27(2)(b), and that the withdrawal of the allowance was an unauthorised deduction from wages and as such contrary to section 13 of the 1996 Act.

LORD JOHNSTON, allowing an appeal by the employers, said that the allowance had been available on the basis that the person in question had access to a car, and those entitled to the allowance had received a sum of money throughout the calendar year divided into 12 equal installments and also a mileage allowance if the car was actually used for work purposes. One of the issues was whether those two parts of the allowance should be treated separately. The important principles to be drawn from *Southwark London Borough Council v O'Brien* [1996] IRLR 420 and *Johnson v Hampshire Probation Service* (unreported) 14 September 1999 (EAT/1144/98) were that generally what could be categorised as allowance, and therefore as expenses, did not necessarily have to meet the precise expenditure incurred. The fact that there was a profit element did not, in an appropriate case, remove the relevant payment from the notion of expenses if otherwise the relevant criteria were met. Nor could an allowance be apportioned between the expense element and the profit element. If there was an expense element that was sufficient to categorise the allowance in question as expenses. The fact that the car was hardly ever used by the employee was nothing to the point if he was receiving a payment that reflected to some extent inevitable expenditure relating to the standing charges that a car owner incurred. In any event, the allowance, both in relation to the user's allowance and the mileage allowance, were two sides of the same coin comprising one allowance with two elements in it, and it was inappropriate to distinguish between the two. The proper construction to be put on the allowance was one of "expenses" in terms of section 27(2)(b) of the Employment Rights Act 1996, and, in those circumstances, there had been no unlawful deduction of wages.

Dundee City Council v Robertson; 7 November 2001; EAT/595/01
EAT(Sc): Lord Johnston, Dr A H Bridge and Ms A E Robertson

APPEAL

An employment tribunal chairman made an order on a pre-hearing review, pursuant to rule 7 of the Employment Tribunals Rules of Procedure 1993 (in Schedule 1 to Employment Tribunals (Constitution and Procedure) Regulations 1993), requiring the applicant to pay a deposit of £150 as a condition of being permitted to continue with his complaint of disability discrimination.

LINDSAY J, dismissing the applicant's appeal against the order, said that the first issue was whether appeal was possible in a case such as the present. It was plain, looking at the 1993 Rules, that what emerged from the employment tribunal in a rule 7 case was an "order". Section 21(1) of the Employment Tribunals Act 1996 provided that an appeal lay to the appeal tribunal on a question of law arising from a "decision" of an employment tribunal, but the word "decision" was given no defined meaning. References in the 1996 Act to "decisions", "orders" and "awards" were all made without any clear meaning emerging such as to deny the word "decision" in section 21(1) its full ordinary meaning as one capable of embracing any determination, award or order. So far there was nothing pointing to the unappealability of a judgment on a rule 7 deposit being required. Nor was there anything about the subject matter of rule 7 which precluded or suggested the exclusion of appeals on determinations under that rule. It was notable, too, that nothing in the 1996 Act pointed to how, if at all, determinations which were not "decisions" in some special sense were to be appealed, or provided that they should be incapable of being appealed. However, the employment tribunal's order under rule 7, depending on one's definition of "interlocutory", would seem not to be a "decision" within the particular terms of regulation 2(2) of the Employment Tribunals (Constitution and Procedure) Regulations 1993. That, though, of itself would preclude an appeal to the appeal tribunal if it were only "decisions" within that regulation 2(2) special meaning which were permitted to be appealed, and there was no such requirement in the Employment Appeal Tribunal Rules 1993. Rule 3(1) of those Rules contemplated an "order" as capable of being the subject matter of an appeal, and, though it was true that rule 3(2) set the time limit for an appeal by reference to the sending out of the employment tribunal's extended reasons, appealability was not necessarily precluded by the absence of extended reasons, especially where, as in the case of rule 7 of the Employment Tribunals Rules of Procedure 1993, the employment tribunal's own Rules provided for reasons being given only in summary form. The applicant was, therefore, entitled to appeal to the appeal tribunal, and the reasons given by the employment tribunal sufficed for the purpose of instituting the appeal. On the issue of perversity, it was plain that a chairman, while aware that his decision was necessarily provisional and could not be based on the fullest evidence and might later be shown to be wrong, could reasonably have arrived at the view that the applicant's proceedings had no reasonable prospect of success.

Hussain v Addaction; 23 October 2001; EAT/755/00
EAT: Lindsay J, Mrs J M Matthias and Mr R Sanderson

EMPLOYMENT TRIBUNAL

An employment tribunal, on an employee's complaint of unfair dismissal, heard evidence from the employer and decided not to hear any further evidence or submissions on the basis that they had taken the view that the dismissal was unfair, because, although the employer had established an admissible reason for dismissal, the penalty of dismissal for the misconduct in question, namely the theft of a damaged packet of 10 cigarettes, was outside the range of reasonable responses. Some submissions on the merits were then made by the employer, but the tribunal upheld the complaint.

MR RECORDER UNDERHILL QC, allowing an appeal by the employer, said that it was the view of the appeal tribunal that, on the facts, dismissal of the employee was unquestionably within the range of reasonable options open to the employer, though the value of the cigarettes was extremely small and they were not part of the current stock. It was common sense that an employer who had to leave an employee in sole charge of stock was entitled to take the view that any dishonest taking of goods was very serious. Though dismissal would usually be a fair sanction, each case turned on its own circumstances. The conduct and reasoning of the employment tribunal was open to criticism in other respects. As the appeal tribunal made clear in *Hackney London Borough Council v Usher* [1997] ICR 705, 713C–D, it was only in the most exceptional case that it was right for a tribunal in an unfair dismissal claim to reach a decision on the issue of reasonableness, where the burden of proof was neutral, without hearing the evidence of both parties. The present was not such a case. But, in any event, it could never be right for such a decision to be reached without the party going first being given an opportunity to make submissions. Whatever the employer was able to say after the chairman had announced the tribunal's decision, it could not have been fair for the employer to be obliged to make those submissions to a tribunal which had already unequivocally announced its decision. It followed that, even if the appeal tribunal had not upheld the appeal on the ground of perversity, the case would have had to be remitted to another tribunal for a full rehearing.

Tesco Stores Ltd v Othman-Khalid; 21 November 2001; EAT/385/00
EAT: Mr Recorder Underhill QC, Mr P D Wickens and Mr G H Wright

FIXED TERM CONTRACT

A tutor was employed under successive fixed term contracts from the beginning to the end of the academic year, each containing a clause waiving any right to claim unfair dismissal on termination of the fixed term without renewal. When his contract was not renewed and he complained of unfair dismissal, an employment tribunal held that during summer vacations the applicant had been absent on account of a temporary cessation of work and, including the previous summer vacation, the applicant's last contract had been for one year or more, for the purposes of section 197(1) of the Employment Rights Act 1996, and he was precluded by the waiver clause from bringing a complaint.

WALL J, allowing an appeal by the applicant, said that the waiver clause only applied if the applicant's contract was for a fixed term of one year or more, and each of the applicant's contracts had been for less than one year. There was a material difference in law between the calculation of continuity for the purposes of redundancy and the right to apply under Part X of the 1996 Act in relation to unfair dismissal. As far as continuity was concerned, it was common ground, applying *Ford v Warwickshire County Council* [1983] ICR 273, that the applicant was employed throughout the entire period of his employment. But when one came to the waiver clause it was self-evident that each contract contained the same clause, that each contract was distinct and that the waiver was made in relation to each of the contracts individually. Those waivers could not be accumulated. Each had to be looked at separately. If one did that, it was immediately self-evident that the waiver clauses were invalid, since none of the contracts was for a period in excess of one year. The waiver clauses in the individual contracts could not be added up to obtain a period of employment in excess of 12 months for the purposes of section 197(1). There was no discrepancy between calculating a period of continuous employment by reference to the individual contracts and at the same time looking at each contract to see whether the waiver clause was valid in relation to that contract.

Puncher v Bishop Grossteste College; 6 November 2001; EAT/691/00
EAT: Wall J, Mr S M Springer and Miss S M Wilson

SEX DISCRIMINATION

An employment tribunal dismissed a claim by an employee that her employer's failure to allocate shares to her when she was absent form work on maternity leave amounted to sex discrimination under section 1(1)(a) of the Sex Discrimination Act 1975, either because she was on maternity leave or by comparison with two actual male comparators.

JUDGE PETER CLARK, allowing an appeal by the employee, said that it could be inferred from the employment tribunal's reasons that the employee had established less favourable treatment to the satisfaction of the tribunal, and the question was whether that treatment was on grounds of her sex, i e because she was on maternity leave. The tribunal had been persuaded, perhaps by the way in which credibility had been put at the forefront of the employer's submissions, to see the case in stark terms: if the employer's evidence was accepted, then the employee's case must fail; if rejected, then she succeeded. The tribunal accepted the employer's evidence; therefore, the claim of sex discrimination failed. Such an approach was fatally flawed in law. The case was a good example of the principles in *Anya v University of Oxford* [2001] ICR 847 in practice. Instead of looking to the employer for an explanation for the less favourable treatment of the employee, the tribunal asked whether the employer's case lacked credibility. As *Anya* made clear, it was necessary for the tribunal to consider the surrounding circumstances relied on by the employee in support of her claim. That the tribunal had manifestly failed to do, contenting themselves with deciding the case solely on the credibility of witnesses. The tribunal had referred to the possibility of unconscious discrimination but failed to go on to deal with it on the facts. It was because, as Neill LJ had pointed out in *King v Great Britain-China Centre* [1992] ICR 516, it was unusual to find direct evidence of discrimination that tribunals had to look at all the surrounding circumstances in order to determine whether the employer was motivated by subconscious, not simply conscious, discrimination. The tribunal had failed to do that in the present case. They failed to apply the correct legal test for the drawing of inferences. However, the employee's submission that the tribunal's conclusion was one which no reasonable tribunal, properly directing themselves, could reach could not be accepted. Accordingly, the case would be remitted for rehearing before a fresh tribunal.

Hayes v Charman Underwriting Agencies Ltd; 19 December 2001; EAT/242/00
EAT: Judge Peter Clark, Mr D A C Lambert and Miss S Wilson

UNFAIR DISMISSAL

An employment tribunal dismissed an employee's complaint of unfair dismissal, holding that, although no reasonable employer could have concluded from the facts that the employee had attempted to defraud the employer by falsely claiming sick pay, which was the sole reason relied on by the employer, the employer's true reason was its concern to be seen to be tackling absenteeism and the employer had acted reasonably in dismissing the employee for that reason.

MR COMMISSIONER HOWELL QC, allowing an appeal by the employee, said that the first and only suggestion of there having been some other and distinct reason for the employee's dismissal had come from the tribunal chairman during the employer's evidence. The evidence was concluded without any further specific reference to the chairman's suggestion that the dismissal might have been justifiable for some other reason than the employee's misconduct, and the employee's representative made no submissions on the possibility of such an alternative reason being relied on by the employer. The tribunal erred in law in basing their decision on their own assumption of an alternative and separate reason for dismissal, when the employer had never put it forward as a separate and independent ground divorced from the misconduct allegation and the possibility had only been touched on by a suggestion from the chairman part way through the evidence and never properly introduced as an issue. The relative informality of proceedings before employment tribunals meant that they were not bound by strict and formal rules of pleading, so, although it was always desirable for matters in issue to be defined beyond doubt by amendment, the important question was not a formalistic one. Instead, it was the practical consideration of whether any alternative reason to be relied on in favour of the employer under section 98(1) of the Employment Rights Act 1996, and most importantly any alternative factual basis to establish such a reason, had been raised clearly enough as a question needing to be addressed, so that the applicant had a fair opportunity of addressing the case he had to meet and deploying his own evidence and argument on any issues that raised. (See *Murphy v Epsom College* [1983] ICR 715, 723, and *Hannan v TNT-IPEC (UK) Ltd* [1986] IRLR 165, para 22.) In the present case it could not be said that the alternative reason for dismissal suggested by the chairman was simply another way of labelling the dismissal actually imposed by the employer for misconduct and fraud. It was necessarily independent of the misconduct charge, which the tribunal quite properly held unsustainable, and raised additional issues of fact. Nor could it be said to have been introduced with anything like the clarity to make it into an issue "expressly ventilated" in the proceedings [see *Murphy*]. The factual case it involved under section 98(1) was necessarily inconsistent with the employer's actual reliance on fraudulent misconduct maintained throughout the evidence. The tribunal erred in deciding the case on that ground. The appeal was also allowed on the ground that no reasonable employment tribunal could have held a summary dismissal for such a reason—the desire of the employer to be seen to be tackling the absenteeism problem—to be within the band of reasonable conduct for a reasonable employer on the facts.

Leeson v Makita Manufacturing Europe Ltd; 20 December 2001; EAT/911/00
EAT: Mr Commissioner Howell QC, Mr J Hougham and Mr R Thomson

UNFAIR DISMISSAL

Preliminary issues were directed to be determined, on an employee's complaints of unfair dismissal and sex discrimination, as to whether, inter alia, she could raise health and safety grounds such as would make any dismissal unfair. A chairman hearing the issues decided that the employee, a trainee registrar, was not entitled to complain that she was dismissed for a reason which fell within section 100 of the Employment Rights Act 1996.

LINDSAY J, on appeal by the employee, said that the judgment related to one of three appeals in the proceedings. The employee had been acting in person and the task had plainly become burdensome, with issues as to her health and questions of adjournment being raised. The matter had a long history, and, bearing in mind the need to be just to both parties, the appeal tribunal had moved on to hear the substance of the appeals, in the absence of the employee. The first appeal concerned section 100 of the 1996 Act. The employer's case had been that section 100 was concerned with dismissal for reasons connected with health and safety only where the risk was to employees, including the applicant; that the provision was enacted to comply with Directive 89/391/EEC, the terms of which were expressly limited to workers and did not extend to problems related to patient care, in the way argued by the employee. The employee had argued that section 100(1)(e) could have been, but was not, phrased to refer to other workers or other employees. The tribunal held that section 100 should be interpreted as limited to the ambit of Directive 89/391. It was to be noted, however, that, whereas in paragraphs (a) and (b) of section 100(1) where "health and safety" was mentioned the words "at work" were added, in paragraph (c) they were not, and in paragraph (e) there was just a reference to "other persons", which on the face of things meant exactly what it said. There was no reason, in point of construction, to limit the ambit of paragraphs (c) and (e) to harm or possibilities of harm at the dismissed employee's place of work or to his fellow employees, or to any employees. The reasoning of the employment tribunal could not be supported. Though it seemed extremely unlikely that the employee's case, as so far raised, did fall within section 100, unfortunately, the employment tribunal never seemed to have considered whether it did. It never looked, so far as one could see, at precisely what her complaints were or to examine whether they could or did fall within section 100. A crucial part of the case was, therefore, left unconsidered by the tribunal. The combination of unsupportable reasoning coupled with that failure amounted to a material error of law. So, provisionally, there was a case for remitting the matter. But whether that would be appropriate turned on other parts of the appeal, to be considered later.

Von Goetz v St George's Healthcare NHS Trust; 18 October 2001; EAT/1395/97
EAT: Lindsay J, Mr P A L Parker and Mr G H Wright

APPEAL

An employment tribunal upheld an applicant employee's claim to be entitled to a full statutory redundancy payment from his employer, a limited company. The company lodged an appeal but was subsequently the subject of an administration order and solicitors acting for the joint administrators indicated to the Employment Appeal Tribunal that there were insufficient funds to continue with the appeal.

JUDGE PETER CLARK, dismissing the appeal, said that the applicant's solicitors had written to the Employment Appeal Tribunal asking the tribunal to dismiss the appeal without the need for them to instruct counsel to oppose it. The solicitors for the administrators had indicated that they were instructed to take no further steps in the appeal. On the appeal Miss McCann of counsel appeared for the applicant. The employer did not appear and was not represented. Paragraph 13 of *Practice Direction (EAT: Procedure)* [1996] ICR 422 was headed "Disposal of appeals by consent". An appeal might be withdrawn by consent without difficulty. An appeal against a reasoned decision of an employment tribunal would not be allowed by consent without the appeal tribunal first determining whether there was good reason for making the agreed order. Nothing, however, was said about the case in which an appellant did not actively pursue an appeal or withdraw it and no agreement was reached between the parties. In such circumstances the appeal ought to be dismissed without an inquiry into the merits for the following reasons. (1) As between the parties, the respondent was seeking to uphold the reasoned decision of the employment tribunal, and, in the absence of argument from the appellant, the appeal tribunal ought not to interfere with it. (2) It often happened that the point in an appeal was of wider interest, and in those circumstances it would be undesirable for the appeal tribunal to reach a conclusion in the absence of argument from the appellant. It was far better that a decision not binding on other employment tribunals but disposing of the lis between the parties should stand without endorsement or qualification by the Employment Appeal Tribunal.

Robert Fletcher (Greenfield) Ltd v Blakeman; 20 November 2001; EAT/767/00
EAT: Judge Peter Clark, Mr B Gibbs and Mr P D Wickens

COMPENSATION

When assessing compensation for unfair dismissal, an employment tribunal made no award for loss of future earnings, holding that, as the employee was in receipt of incapacity benefit, she was unable to work, had no ability to earn, and, therefore, had suffered no loss. The tribunal also made an award of costs for the remedy hearing against the employee on the ground that she had acted unreasonably, within the meaning of rule 12 of the Employment Tribunals Rules of Procedure 2001, in refusing a reasonable offer from the employers to settle her claim, while expressing the view that in the circumstances it was insulting to the employee for the employers to seek costs against her and suggesting that the order should not be enforced.

LINDSAY J (PRESIDENT), dismissing the employee's appeal against the compensation order but setting aside the costs order, said that the employee asserted, inter alia, that the tribunal had wrongly treated her receipt of incapacity benefit as conclusive of her being unable to work. It had been entirely proper for the employment tribunal to look carefully at the employee's application for incapacity benefit and the incapacity for work questionnaire. The tribunal would not have been justified in jumping from the fact that she was in receipt of incapacity benefit to a conclusion that she was on that account unable to work. Regulation 25 of the Social Security (Incapacity for Work) (General) Regulations 1995 showed that the benefit system was concerned with a form of *deemed* incapacity for work which was not necessarily an actual inability to work. The employment tribunal's statement that "she is *therefore* unable to work" provided some fuel for the employee's argument, but it was difficult to accept that an experienced tribunal would believe that merely because of the receipt of incapacity benefit there was, in necessary consequence, an inability to work. In context, "therefore" could be seen as meaning no more than "in all the circumstances we have described". As such it was a legitimate finding of fact and represented no error of law. As to costs, the tribunal had a broad discretion which made it difficult to point to an error of law. The discretion did, however, have to be exercised judicially. An award of costs was properly a two-stage exercise: first, the question was whether the discretion under rule 12 of the Employment Tribunals Rules of Procedure had arisen—that was answered affirmatively—but the second question was whether that discretion should be exercised and if so what award should be made. That question did not seem to have been considered. Further, the tribunal's curious remark about it being insulting for the employers to seek costs and the expression that consideration might be given to not enforcing the costs order could only be explicable as it being the wish of the tribunal to put some pressure on the employers not to seek costs by their taking into account in making the order for costs that it might not be enforced. Both those points represented errors of law and the award of costs would be set aside. It was far from an extreme case of a party conducting proceedings unreasonably. An offer of £1500 had been made relatively shortly before the remedies hearing and the award was £1007. While not wishing to deter the making and acceptance of sensible offers, if it became the practice that an applicant who received no more than two-thirds of a sum offered in a rejected *Calderbank* offer was then, without more, to be visited with the costs of the remedies hearing, such offers would become frequent, yet it was plain that the legislature had never so provided. The employment tribunals' costs regime was to be distinguished from the costs regime in the High Court and the county court where costs commonly followed the event and a *Calderbank* offer could be given particular significance.

Monaghan v Close Thornton; 20 February 2002; EAT/3/01
EAT: Lindsay J (President); Mrs M T Prosser and Mr P D Wickens

PRACTICE

An assertion by an applicant making an unfair dismissal complaint that she had been employed by the respondent as the "manageress" of a service station since 1993 was directed to be determined as a preliminary issue. The respondent was anxious to obtain a ruling that persons in the position of the applicant were self-employed franchisees and not employees, and the applicant's case was listed with three similar cases. At the end of the first morning of the three days listed for the hearing, after hearing submissions from counsel for the respondent and from the applicant, the tribunal indicated that the applicants faced the risk of an order for costs if they did not withdraw their claims. The applicant said that faced with the threat of substantial costs she could not go ahead, and the tribunal decision was that the application was dismissed on withdrawal by the applicant.

MAURICE KAY J, allowing an appeal by the applicant, said that the picture that emerged was of the respondent seeking to persuade the employment tribunal to dismiss the applicant's application in limine, the tribunal declining to accede to that, but on its own initiative saying to the applicant that if she proceeded she might end up with a substantial order for costs against her. The applicant argued that the employment tribunal had put her under unfair and inappropriate pressure to withdraw. It was accepted that the employment tribunal had acted at all times in good faith, but if the reality was that the applicant's withdrawal was caused and conditioned by an unfair and oppressive approach the appeal tribunal was entitled to relieve her from the consequences of that unfairness and oppression. In the judgment of the appeal tribunal, the employment tribunal was wrong to issue the costs warning in the forms it did in circumstances in which it had decided not to accede to the respondent's application for summary disposal. Moreover, that had all occurred in a jurisdiction in which unsuccessful litigants were only exceptionally subjected to costs orders and in which the statutory mechanism for discouraging applicants who had a case which was considered at an early stage to have no reasonable prospect of success was the requirement of a modest deposit. Regrettably, the approach of the tribunal had been unfair and oppressive and had left the applicant no other alternative but to withdraw. The appeal tribunal had been referred to statutory provisions and authorities which, the respondent submitted, would enable the tribunal to allow the appeal and substitute an order dismissing the applicant's application, should the tribunal take the view that her case would have been bound to fail in any event. What that jurisprudence failed to disclose was any case in which the appeal tribunal had substituted its own decision dismissing an application where there had never been a full substantive hearing. It would not be right to dismiss the applicant's application in the circumstances. No evidence had been heard and the appeal tribunal had not had the benefit of full argument on the documents. The case would be remitted to a different tribunal, initially for directions.

Gee v Shell UK Ltd; 14 January 2002; EAT/484/00
EAT: Maurice Kay J, Mr J Crosby and Mrs T Marsland

PRACTICE

An employee went home from her employment as a cleaner at Heathrow Airport because she was told that she could not continue to work there as she had no security pass. The employee did not return to work believing that she required a pass. On a complaint of unfair dismissal by the employee, the employers contended that they had explained to the employee that she did not require a pass and that she was absent from work without authority. The employment tribunal found that, having regard to the fact that the employee could not speak English at all well and had to rely on an interpreter, the employers had failed to explain what the position was and the employee had been unfairly dismissed. An application for a review was made by the employers on the ground that a fair hearing had not taken place since they had not been notified that an interpreter was to be used and that the interpreter was in fact the employee's daughter-in-law. The application was rejected.

JUDGE PUGSLEY, dismissing an appeal by the employers, said that the employers contended that it was wrong for the daughter-in-law to act as an interpreter but their real grievance was that they had had no prior knowledge that an interpreter would be used. That was a fair point, but it was not appropriate to lay down guidelines of a far reaching nature as the case could be confined to its own facts. It seemed that the interpreter had been asked two questions by the tribunal chairman along the lines of: "Did the employee feel she couldn't return to the job because of the identification pass?"—answer "Yes"—and "Did she enjoy the job?"—answer "Yes, even when she was ill". There was nothing in the decision that one could point to as a major finding of fact relating to that evidence, and, in the context of the case, there was no injustice in the way that occurred. There were always going to be difficulties with interpreters, but tribunals would be able to form a view on the reliability of someone's evidence, albeit that it was given through an interpreter. Though there was no legal duty, it was good practice for notice to be given where an interpreter was to be used. Further, it might be appropriate either at the directions hearing or earlier for people who were going to use an interpreter to give an indication, so that the issue was flagged up for the other side. On the facts, however, having regard to how evidence from the interpreter emerged, there had been no breach of natural justice.

OCS Cleaning South Ltd v Dhillon; 22 November 2001; EAT/778/00
EAT: Judge Pugsley, Mrs D M Palmer and Mr P M Smith

PRACTICE

At the conclusion of an applicant's evidence an employment tribunal concluded that he had not established that he had been less favourably treated than a comparator and dismissed his complaint of sex discrimination. The tribunal took the view that the applicant had acted frivolously and unreasonably in pursuing his complaint because it had no reasonable prospect of success and they ordered him to pay £100 by way of costs.

MR RECORDER LANGSTAFF QC, dismissing an appeal by the applicant against the dismissal of his complaint and allowing an appeal against the order for costs, said that the appeal tribunal wished to emphasise, yet again, that a tribunal should exercise its power to accept a submission of no case to answer only in exceptional and rare cases. However, the appeal tribunal had been persuaded that the employment tribunal had been entitled to take the view that it was such an exceptional case. That was because the case that the applicant was advancing had to begin with the proposition that he was comparing like with like. Discrimination existed where someone in like circumstances to another was treated in an unlike manner or where people in unlike circumstances were treated in a like manner. What was in the tribunal's mind was the applicant's inability, having given his evidence and been questioned, to show to their satisfaction that his circumstances were materially similar to those of his chosen comparator. The power to award costs, under rule 12 of the Employment Tribunals Rules of Procedure 1993, should be exercised with restraint because it involved, or might indicate, that the individual against whom the order was made had acted in bad faith. There was an obvious inconsistency between the decision of an employment tribunal chairman at a preliminary hearing to reject an application by the employer to strike out the applicant's claim as having no reasonable prospect of success and the decision to the opposite effect by the tribunal which heard the case. That inconsistency required some explanation. The costs decision was either one reached without regard to the earlier tribunal hearing or it was one which did not sufficiently explain its reasoning, such that it could not stand.

Stubbings v Ministry of Defence; 1 February 2002; EAT/1420/99
EAT: Mr Recorder Langstaff QC, Mr B V Fitzgerald and Mr S M Springer

UNFAIR DISMISSAL

An employment tribunal rejected a claim by an employee, who was a chargehand and health and safety adviser, that he had been unfairly dismissed under section 100(1)(a) of the Employment Rights Act 1996, in that he had been selected for redundancy because of his health and safety activities; but the tribunal found that the employee's dismissal was unfair under section 98(4) in that the employer, when carrying out its redundancy exercise, had assessed the employee simply as a chargehand and failed to give credit for his work as an adviser.

WALL J, allowing an appeal by the employer and dismissing the complaint, said that the employment tribunal's decision had focused substantively on *Smiths Industries Aerospace & Defence Systems v Rawlings* [1996] IRLR 656, where the applicant was an elected health and safety representative. The majority of the tribunal took the view that in so far as dismissal under section 98(4) was concerned that case was not binding on them. They accepted the applicant's argument that it was a case on its particular facts and related specifically to a trade union health and safety representative, who claimed the protection of section 100(1)(b), and did not apply to an adviser, who was protected by section 100(1)(a). There was, however, no reason in principle to distinguish between the protection afforded to persons who came within paragraph (a) of section 100(1) [advisers] and those who came within paragraph (b) [representatives]. The appeal tribunal agreed with the conclusions in *Smiths Industries*. Its conclusion that "the protection against dismissal in a redundancy exercise afforded to health and safety representatives is neutral" applied equally to employees who were advisers within section 100(1)(a). Like those within section 100(1)(b) they must not be disadvantaged by negative discrimination, and equally they were not entitled to be advantaged over their fellow employees in the redundancy selection pool.

The employment tribunal's decision in the present case that there should have been positive discrimination was an error of law. The tribunal regarded what it perceived as the failure to exercise positive discrimination as effectively determinative of the "unfairness" issue under section 98(4). It did not address the statutory criteria within section 98(4)(a) and it undoubtedly substituted its own view of what was fair and unfair rather than considering the question of whether the dismissal lay within the range of conduct which a reasonable employer could have adopted.

Shipham & Co Ltd v Skinner; 13 December 2001; EAT/840/00
EAT: Wall J, Mr J R Crosby and Mr S M Springer

CONTINUOUS EMPLOYMENT

An employee, whose employment had commenced in 1973, did not return to work after maternity leave in 1990, and, pursuant to her employer's "child break scheme", resigned, while remaining in contact with the employer and working at least two weeks each year, with the promise of re-employment in a managerial position on her return. The employee recommenced full-time employment in 1994. In 1999 she was made redundant and paid a redundancy payment calculated on the basis that her continuity of employment had been broken by her absence under the scheme. An employment tribunal dismissed her claim for an unlawful deduction of wages.

JUDGE WILKIE QC, allowing an appeal by the employee, said that the employment tribunal had been right to reject the employee's first argument that throughout the period of the child break scheme her relations with her employer were governed by a contract of employment, because there had been an absence of mutuality of obligation in respect of the provision and performing of work, which was the necessary precondition for a contract of employment. The employee then argued that the scheme was an arrangement by which she was "regarded as continuing in the employment of her employer for any purpose" and so fell within section 212(3)(c) of the Employment Rights Act 1996. That provision provided that a week not governed by a contract of employment during which an employee was "absent from work in circumstances such that by arrangement or custom he is to be regarded as continuing in the employment of his employer for any purpose" counted in computing an employee's period of employment. The majority of the appeal tribunal had concluded that the child break scheme did, as a matter of law, amount to an arrangement which fell within section 212(3)(c). The starting point was that section 212(3)(c) only bit where there was no contract of employment in existence. Thus, the fact that the employee had been required to, and had, resigned and suffered all the incidents of the cessation of her contract of employment was not determinative. One had to look at the terms of the agreement as the primary source of evidence as to what the parties regarded as the position during the period when it was envisaged there would be no contract of employment in existence. It was clear, in the view of the majority, that the parties envisaged that there would be some relationship between them during that period. The employee was to keep her hand in by working at least two weeks a year. She was not to seek alternative employment without consulting the employer. She was to have a line or personnel manager allotted to her. That set of arrangements clearly had a purpose, namely, to facilitate the smooth re-engagement of the employee in to a management role at the conclusion of the break. Those manifestations of continuing obligations and contacts could only sensibly be described as continuing the employment relationship.

Curr v Marks & Spencer plc; 6 March 2002; EAT/1284/00
EAT: Judge Wilkie QC, Mr D A C Lambert and Mr K M Young

DISCIPLINARY PROCEEDINGS

An employee was disciplined for circulating a letter containing his grievances about his employers' staff and practices. A memo from the employers to the disciplinary panel stated that it was the employers' view that the employee's action constituted gross misconduct. The applicant was dismissed and made a complaint of unfair dismissal on the ground that he had not had a fair hearing. The employment tribunal dismissed the complaint.

JUDGE PUGSLEY, allowing an appeal by the employee, said that at the preliminary hearing of the appeal it had been submitted that the memo was bound to prejudice the minds of the employees conducting the disciplinary hearing and that the likelihood of the employee getting a fair hearing was very uncertain. The appeal tribunal was uncomfortable with equating the question of judicial bias with the conduct of a disciplinary hearing. There would be many cases involving small employers when it would be wholly unrealistic to expect that the person making the decision to dismiss would be unaware of many of the details of the case and would not have close relations with, and knowledge of, the person involved. The tribunal should be guided by *Bentley Engineering Co Ltd v Mistry* [1979] ICR 47, where Slynn J had quoted with approval the words of Harman J in *Byrne v Kinematograph Renters Society Ltd* [1958] 1 WLR 762, 784: ". . . the person accused should know the nature of the accusation made . . . he should be given an opportunity to state his case; and . . . the tribunal should act in good faith . . ." Slynn J had refined that by saying that natural justice required not merely that a man should have a chance to state his own case in detail but he must know in one way or another sufficiently what was said against him. In the context of disciplinary proceedings in employment it would be quite wrong to lay down formalistic rules that would disqualify a range of persons from taking any part in the decision to dismiss or uphold that decision on an appeal hearing. The procedure to be adopted and the persons appropriate to make the decision to dismiss and hear any appeal against that decision would vary with the nature of the undertaking and the complexity of the issues involved. The sense of fairness of an employment tribunal, including as it did members with experience of both sides of industry, was a sufficient bulwark against unfairness in the workplace. The appeal tribunal was, however, concerned at the failure of the employment tribunal to deal with the notes of guidance given to the disciplinary panel in the employers' memo. The letter circulated by the employee was redolent of the reaction of someone who felt a sense of injustice without having the sophistication to express that injustice in appropriate and suitably emollient terms. The tribunal's reasons lacked any recognition that, having taken careful steps to ensure that the panel should be free from bias, the memo then appeared to pre-empt the most crucial decision, namely, whether circulation of the letter was an act of gross misconduct. It was not that the memo inevitably tarnished the decision to dismiss, so that any such dismissal must be unfair, but that, given the factual background, the memo raised serious issues which demanded the tribunal's scrutiny and appropriate findings. That was an issue that went to the very heart of the decision of fairness. The only way to deal with the matter was to direct a rehearing before another tribunal.

Caredda v London Goodenough Trust for Overseas Graduates; 16 January 2002; EAT/843/00
EAT: Judge Pugsley, Mr K Edmondson and Mrs R A Vickers

HOLIDAY PAY

An employment tribunal awarded an employee £277 in respect of arrears of accrued holiday pay entitlement, based on a calculation of the daily rate of pay arrived at by taking as the relevant number of days the 233 working days in a year.

JUDGE WILKIE QC, dismissing an appeal by the employer on the preliminary hearing, said that the employer argued that the appropriate number of days in a year for the calculation of the daily amount of pay was 365 days. In *Thames Water Utilities v Reynolds* [1996] IRLR 186 the Employment Appeal Tribunal concluded that "day-to-day" in section 2 of the Apportionment Act 1870 meant calendar days and not working days. On the face of it, therefore, it might be thought that the present appeal had an arguable prospect of success. It was, however, the strong view of the lay majority of the appeal tribunal that such an approach was at odds with the virtually universal practice in industry in respect of the calculation of pay in respect of accrued holiday entitlement, which was by reference to a day's work rather than calendar days per year. Furthermore, the *Thames Water* case predated the Working Time Regulations 1998, which provided the paradigm for provisions in respect of periods of leave. Reference was made in paragraph 16 of the Regulations to sections 221 to 224 of the Employment Rights Act 1996 which were concerned, among other things, with the calculation of a week's pay, and it was noticeable that all of those provisions took as their working assumption the hours actually required to be worked, not the number of hours in a 24-hour day or a seven-day week. Accordingly, it seemed that in the particular context the concept of day-to-day accrual for the purposes of calculating payment for accrued holiday entitlement must be by reference to the number of working days in the year and not the number of calendar days in the year.

Leisure Leagues UK Ltd v Maconnachie; 14 March 2002; EAT/940/01
EAT: Judge Wilkie QC, Ms J Drake and Mr R N Straker
Reporter's note. See also *Taylor v Lowe*, 20 July 2000, EAT/128/99; Recent Points [2000] ICR Part 8.

PRACTICE

An employment tribunal dismissed an employee's complaint of unfair dismissal, pursuant to rule 9(3) of the Employment Tribunals Rules of Procedure 1993, when neither the applicant nor his solicitor had appeared nearly an hour after the hearing was due to commence. The solicitor had phoned the tribunal that morning to say that he was unwell and unable to attend and that he would send a fax later, but no fax had been received. The applicant himself later explained that he had mistakenly attended at the Employment Appeal Tribunal and when he arrived at the employment tribunal his case had been struck out.

JUDGE PUGSLEY, allowing an appeal by the applicant, said that it would have been sensible for the applicant's solicitor to seek a review of the tribunal's decision and to give his explanation for the non appearance of himself and his client at the first opportunity. The failure of litigants to appear at the time and place required was a justifiable source of judicial irritation, but the appeal tribunal was concerned that the employment tribunal had acted in a peremptory manner in dismissing the case when they had had notice that the applicant's representative was unwell. The tribunal could have adopted the simple and sensible expedient of adjourning the case for the applicant to show cause why it should not be struck out for want of prosecution. If a solicitor, or any responsible person, informed a tribunal that they were incapacitated through illness, that explanation should not be rejected without clear and cogent reasons. It was not a proper exercise of the judicial discretion to strike out a case for non appearance when the solicitor had telephoned to say that he was not fit to attend; and the failure of the applicant's solicitor to confirm that by fax had to be seen in the context of the options available to someone who was incapacitated. The case would be remitted for the employment tribunal to review its decision to strike out.

Adebayo-Orebote v Sureway Parking Services Ltd; 7 December 2001; EAT/1242/00
EAT: Judge Pugsley, Lord Davies of Coity and Mr B M Warman

RELEVANT EMPLOYEE

When an employer sought to implement a new shift system its warehouse operatives went on strike. All the operatives were subsequently dismissed, apart from W who had not worked for five months because of ill health. Complaints of unfair dismissal by the operatives were dismissed by an employment tribunal on the ground that they were taking part in a strike and had failed to show, for the purposes of section 238(2) of the Trade Union and Labour Relations (Consolidation) Act 1992, that one or more relevant employees had not been dismissed.

HOLLAND J, dismissing an appeal by the applicant operatives, said that the applicants had submitted that W, who had not been dismissed, was a "relevant" employee. since, although he had not been physically present at work at the time, he had voted for strike action in the union ballot and should be taken to have been "taking part in the action" within the meaning of section 238(3)(b). It was said that the employment tribunal had misdirected itself: the issue was not whether W was "on strike" but whether he was taking part in a strike or other industrial action, which activity was less specific. Criticisms of the reasons were justified. Granted that economy of expression was a virtue, the terse directions as to law were arguably inapposite at worst, opaque at best, and the findings of fact, hopefully, did not do justice to the review of all the circumstances. But, that said, there was a decision on the facts and, given the patent absence of "exceptional circumstances" as identified in *Hindle Gears Ltd v McGinty* [1985] ICR 111, 118D, not only was there no basis on which it could be attacked as perverse, it was arguably the only one open to the tribunal when all the circumstances were taken into account. The lay members of the appeal tribunal wished to emphasise that a section 238 issue was rarely easy and called for careful factual analysis which should be apparent from the reasons. The appeal tribunal were satisfied, however, that, in the particular circumstances of the case, any misdirection as to law did not impugn the findings of fact.

Pointon v BBA Friction Ltd; 12 April 2002; EAT/1380/00
EAT: Holland J, Mr P R A Jacques and Mr J Rivers

WAGES

An employment tribunal chairman dismissed claims by employees, under section 23 of the Employment Rights Act 1996, to be paid travelling expenses between home and work for attendance outside their normal working hours, on the ground that such expenses were incurred "in carrying out [their] employment" within the meaning of section 27(2)(b) of the Act and as such excluded from the definition of wages in section 27.

MAURICE KAY J, dismissing an appeal by the employees, said that the employment tribunal chairman had been referred to *Barrie v Rochdale Metropolitan Borough Council* (unreported) 5 May 1995 and *Southwark London Borough Council v O'Brien* [1996] IRLR 420. There was a passage in *Barrie* that seemed to come very close indeed to the circumstances of the present case, and though the employees had sought to distinguish that case on the basis that there the principal argument was as to whether there was a profit element in the expenses, that was not an important point of distinction. *Barrie* had been cited with approval by Mummery J, in giving judgment in *O'Brien's* case, where he said, at p 423: "We agree . . . that in a case such as this a finding has to be made that the deduction was either wholly in respect of wages or wholly in respect of expenses. What it is in each case is a matter of fact and degree." The appeal tribunal had not found the present case to be simple, not least because in section 27(1) and (2) two different forms of expression were used, namely, "in connection with his employment" and "in carrying out his employment". But, having regard to all the circumstances, and in particular that *Barrie* had remained uncriticised for more than five years, notwithstanding any difficulties in interpretation, *Barrie* ought to be followed and the conclusion of the tribunal chairman upheld. Section 27(2)(b) embraced the assumed facts of the present case involving the common feature of travel between home and workplace. In the last resort, it mattered not whether that was correctly described as a matter of jurisdiction; the question was whether the facts fitted the section. There was another matter worthy of note. In *O'Brien's* case Mummery J expressed the view that it was preferable for cases under Part II of the 1996 Act to be heard by a chairman sitting with lay members, rather than alone. In the present case, ultimately the chairman had only been called on to decide a narrow point of construction on assumed facts, but that might not have been his only task. It did nothing to invalidate his decision and the parties had agreed to that course, but the mere agreement of the parties was something which Mummery J had suggested ought not to be conclusive as to the constitution of the tribunal; and the present appeal tribunal would associate themselves with his comments.

Wildgoose v Rampton Hospital Authority; 17 December 2001; EAT/977/00
EAT: Maurice Kay J, Miss A Mackie and Mr P R A Jacques

APPEAL

An applicant applied for an order striking out the respondents' notice of appearance on the ground of their scandalous behaviour in conducting the proceedings in that an application by the respondents for an adjournment of the hearing, which had been granted by the employment tribunal, had been made in bad faith. The employment tribunal found that there had been no deliberate intention to deceive or mislead the tribunal and dismissed the application to strike out.

JUDGE WILKIE QC, dismissing an appeal by the applicant, said that notes of evidence given by the respondents' solicitors, if accurate, raised the gravest doubts about the veracity of an explanation given to the employment tribunal by the solicitors in correspondence with the employment tribunal, and, having called in to question the reliability and veracity of the sources of evidence on a crucial issue, plainly the true basis of the respondents' earlier letter of application for an adjournment was called in to question. If the remit of the appeal tribunal had enabled it to interfere with findings of fact or to consider whether the employment tribunal had misunderstood or misapplied the facts, then the appeal tribunal might well have been persuaded that the employment tribunal's decision should not stand. However, the powers of the appeal tribunal were severely constrained; it could only uphold an appeal on a point of law, and what amounted to a point of law was equally well established. In *British Telecommunications plc v Sheridan* [1990] IRLR 27 the Court of Appeal had identified the bases on which the appeal tribunal could interfere with the decision of an employment tribunal. It could do so if it was satisfied that the tribunal had misdirected itself as to applicable law, or if there was no evidence to support a particular finding of fact, or if the decision was perverse in the sense explained by May LJ in *Neale v Hereford and Worcester County Council* [1986] ICR 471. But misunderstanding or misapplication of the facts was not a separate category on which the appeal tribunal could allow an appeal if it took a different view of the facts from the employment tribunal. To the extent that any earlier authorities identified that as a separate basis for allowing an appeal, they should not be followed. There was no question of the tribunal in the present case having misdirected itself as to the law, there was ample evidence to support its conclusions of fact and, having regard to the totality of the evidence, the appeal tribunal could not say "My goodness, they have got that wrong." What there was was a body of evidence, both written and oral, which pointed in a certain direction and there was, equally, a passage of evidence, fairly short, but to the point, which appeared to point in the opposite direction.

Lewin v North East London Probation Service; 1 March 2002; EAT/1123/01
EAT: Judge Wilkie QC, Mr D A C Lambert and Miss A Mackie

COMPENSATION

An employment tribunal assessed compensation for race discrimination on the basis that, on the balance of probabilities, the applicant employee would have returned to work for the employers had the employers approached matters differently, and it compensated her for the totality of her loss of earnings from the termination of her employment until a date, beyond the remedies hearing, by which time she should have been able to find other work.

JUDGE WILKIE QC, allowing an appeal by the employers, said that the employers argued that the tribunal had made a fundamental error of approach: it was not concerned with making a finding of fact as to what had already happened but with carrying out an assessment of what might have happened had the employers acted in an appropriate way. It was said that that normally would involve a percentage assessment, which in an appropriate case might be 100%. The tribunal had expressed itself clearly. It had made a finding of fact on the balance of probabilities. But it was equally clear that where one was assessing the chance of something happening in the future that was not the appropriate approach and some different approach, demonstrating that the process was one of assessing a chance, was necessary. The case would be remitted to a different tribunal on the question of remedy.

Ministry of Defence v Moitra; 12 February 2002; EAT/1512/00
EAT: Judge Wilkie QC, Dr D Grieves and Mr R Sanderson

COMPENSATORY AWARD

Following a decision that an applicant employee had been unfairly dismissed, an employment tribunal found that the employee had been out of work for four weeks and calculated the basic and compensatory awards by taking the employee's gross weekly pay as £120 for a 63·5 hour week and making an allowance in respect of the compensatory award of £50 per week for loss of free accommodation.

JUDGE PETER CLARK, allowing an appeal by the employee against the calculation of the awards and remitting that matter to a different tribunal, said that where it was contended that an employee was paid less than the national minimum wage that was a matter which had to be investigated by the employment tribunal when assessing both the basic and compensatory awards for determining the proper level of compensation recoverable for unfair dismissal. It was no answer that the employee had made no claim under the minimum wage legalisation per se. The inquiry should be added to the list of issues properly arising for consideration by the tribunal set out in *Langston v Cranfield University* [1998] IRLR 172. By section 17 of the National Minimum Wage Act 1998 a worker who was paid less than the statutory minimum had to be taken as entitled to be paid under his contract the difference between what he was paid and the amount of his entitlement under the Act. Section 49(1) prohibited contracting out of the statutory right to be paid the minimum wage. It followed that the calculation of a week's pay for the purposes of section 221(2) of the Employment Rights Act 1996 was subject to the statutory minimum wage. In so far as the employee's actual gross wage fell below the statutory minimum the higher figure had to be used in calculating a week's pay. Having calculated the employee's gross weekly pay in accordance with the national minimum wage, that sum had to be reduced by the notional tax and National Insurance deductions to provide the net wage. There had been no investigation by the employment tribunal as to the minimum wage to which the employee was entitled. A further complication was the free accommodation provided by the employer. Whereas the provision of free accommodation did not go to reduce the statutory minimum wage for the purpose of calculating a week's pay in the context of a basic award, in assessing the compensatory award there would be an element of double recovery if no account was taken of the notional value of the accommodation in the net weekly wage based on the national minimum wage. Applying the just and equitable principle in section 123(1) of the 1996 Act, the matter should be approached by calculating the gross pay by reference to the actual hours worked multiplied by the statutory minimum wage, deducting the maximum weekly allowance for accommodation (£19·95) provided for in regulation 36 of the National Minimum Wage Regulations 1999, and netting down the result to allow for tax and National Insurance contributions to give the multiplier for the purpose of calculating the loss of earnings over the four-week period. In addition the employee was entitled to the actual value to him of the loss of accommodation, assessed by the tribunal at £50 per week.

Paggetti v Cobb; 22 March 2002; EAT/136/01
EAT: Judge Peter Clark, Ms J Drake and Mr K M Young

HOLIDAY PAY

Under his contract of employment, an employee's remuneration comprised his basic salary plus commission in relation to contracts sold to clients in respect of which 25% of the fee had been paid, and he was entitled to holiday pay at his normal basic rate. An employment tribunal rejected a claim by the employee that, by failing to include commission payable in the calculation of a week's pay for the purposes of regulation 16 of the Working Time Regulations 1998, the employers had made an unauthorised deduction from his wages.

JUDGE WILKIE QC, allowing an appeal by the employee, said that, applying section 221(1)(2)(3) of the Employment Rights Act 1996, the employee's employment was one where there was a normal number of working hours and the amount of work done in the period of normal working hours did not vary, in the sense that payment was not based on the amount of work done, rather that payment of commission was based on the outcome of that work. Therefore, one would have thought that, on the natural meaning of those subsections, commission would not be included as part of payment and the averaging out provisions of subsection (3) would not apply. However, section 221(4), which provided that references to remuneration varying with the amount of work done included remuneration which might include commission, had the effect of overriding the normal meaning of subsection (3) so that an employee, who received payment by way of commission which was not payment by reference to the amount of work done but payment by reference to the varying result of work done, was provided for by subsection (3) rather than subsection (2). It followed that, in rejecting the employee's argument that he was entitled to holiday pay calculated by reference to the previous 12 weeks' actual earnings of normal basic pay plus commission, the tribunal had erred in law. In respect of accrued holiday pay entitlement he was entitled to have that payment calculated by reference to the statutory formulation in section 221(3).

Evans v The Malley Organisation Ltd (t/a First Business Support); 19 February 2002; EAT/99/01
EAT: Judge Wilkie QC, Mr B Gibbs and Ms H Pitcher

PRACTICE

On an employee's complaint, inter alia, that his employer had failed to make to him payments under six heads, the employment tribunal's reasons stated that the employer accepted the applicant's claims for four of the heads of claim and that the parties had asked the tribunal not to consider them, and the tribunal ruled only on the two remaining heads.

MR RECORDER BURKE QC, allowing an appeal by the employee, said that the employer had decided not to appear at the appeal hearing. At no point was it suggested in either the tribunal's reasons or the chairman's notes that the four individual contract claims were to be withdrawn and the tribunal decision itself did not say anything about them. If there had been an agreement between the parties as to those four heads of claim, the tribunal could have either given effect to it by deciding that the heads of claim were withdrawn on agreement or by awarding by consent the sums agreed. If there was no agreement, merely a concession by the employer, the tribunal would have been expected to have made an order in favour of the applicant for the sums conceded. The tribunal did not take any of those courses, and thereby erred in law, because it was bound to make a decision in one form or another, though the tribunal was not wholly to blame, since the parties, through their representatives, ought to have made clear to the tribunal what order they were seeking. Since it was not certain what precisely had happened between the parties, there was no sensible alternative to the matter being remitted to the employment tribunal so that it could resolve between the parties what orders should be made. Counsel for the employee had put the case on an alternative basis. She submitted that in a letter from the employee's solicitors to the tribunal a request had been made for a review of their decision, at which review matters could have been put right. The tribunal had written that the parties had asked them not to consider the four heads of claim and they could not incorporate in to their decision matters which the parties had asked them not to consider. Counsel said that was a refusal of an application for a review. The solicitors' letter, however, did not amount to an application for a review. It was in fact a request to the tribunal to insert in to the original decision an award of amounts in relation to the four heads of claim which had not been dealt with at the hearing.

Gooden v Ritz Country 1035 Ltd; 31 January 2002; EAT/1469/00
EAT: Mr Recorder Burke QC, Miss C Holroyd and Mr R Thomson

REVIEW

An applicant reached an agreement through Acas with the respondent to his claim of wrongful dismissal. Though Acas asserted that they had informed the employment tribunal of the agreement and that, accordingly, there was no need for a hearing, the tribunal denied that they had been so informed, and on the day fixed, when neither party attended, the chairman dismissed the applicant's claim. The chairman refused an application by the applicant for a review on the ground that it had no reasonable prospect of success, commenting that, as the applicant had no doubt received the payment agreed, the interests of justice did not require a review.

MR RECORDER BURKE QC, allowing an appeal by the applicant, said that the respondent had written to say that it did not oppose the appeal. The chairman's failure to allow a review was an error of law. It was not a decision which, on the facts, could reasonably have been reached. There was a real difference between a decision on the register dismissing the claim on the basis that it had failed and a decision that the claim had been withdrawn, the parties having reached an agreement. The difference was not trivial and the applicant was entitled to have the decision expressed in terms that reflected what had really happened and not what the chairman had originally thought had happened, though through no fault of his own he had not been informed of the true situation. No one would have been prejudiced by the replacement of the order with an order in the terms suggested. It was possible that the chairman could have simply corrected the error under the slip rule: rule 10(9) of the Employment Tribunals Rules of Procedure 1993. That seemed the easiest and most sensible course for the appeal tribunal to take and it would, therefore, be directed that the register be amended so as to substitute for the decision that the application failed and was dismissed an order that it was dismissed on withdrawal by agreement of the parties.

Davoren v London Fire Protection Services; 31 January 2002; EAT/1433/00
EAT: Mr Recorder Burke QC, Miss C Holroyd and Mr T C Thomas

WAGES

An employee had taken 15 days of her 20-day annual leave entitlement when she left her employment after six months of the leave year. An employment tribunal chairman upheld her claim for unpaid wages but deducted five days' overpaid holiday pay.

JUDGE PETER CLARK, allowing an appeal by the employee, said that, where a worker's employment terminated during the course of a leave year and at the date of termination she had taken more leave proportionately than she was entitled to in that year, the position was governed by regulation 14(4) of the Working Time Regulations 1998, which provided that a relevant agreement might provide that in such circumstances the worker should compensate the employer. It was common ground that no relevant agreement had been entered into by the parties in the present case. The position was that the employee was entitled to and had received wages for the 15 days' holiday taken during her employment. Credit for the five extra days' holiday pay would only arise where there was express provision in a relevant agreement. In those circumstances an exception was made under section 13(1) of the Employment Rights Act 1996; the deduction of excess holiday pay from the final wage entitlement being authorised by the employment contract or previously agreed or consented to in writing. Section 14(1) of the 1996 Act was immaterial, whether or not there was a relevant agreement, as there was no "overpayment" of holiday pay. The employee was entitled to paid holiday, up to 20 days per year, under regulation 16(1).

Hill v Chapell; 20 March 2002; EAT/1250/01
EAT: Judge Peter Clark, Mr J Hougham and Mr P R A Jacques

DISABILITY COMPENSATION

An employee, who had been dismissed in breach of the employers' procedures in April 1999 after being off work for a number of months suffering from irritable bowel syndrome developed as a result of being bullied at work, was reinstated and transferred to work which, though physically appropriate, did not address the underlying psychological problem. In November 1999 he was dismissed on grounds of ill-health capability. An employment tribunal upheld the employee's complaint of disability discrimination under section 5(1) of the Disability Discrimination Act 1995, finding that, since the employers had made no attempt to determine what adjustments might be made to enable the employee to work for them, they could not raise a defence of justification under section 5(1)(b). The tribunal awarded £2000 for injury to feelings but nothing for loss of earnings following the second dismissal on the ground that by November 1999 the employee had formed a view that the employers were not to be trusted and, accordingly, he would not have taken up any other job with them.

JUDGE PETER CLARK, allowing an appeal by the employee against the amount of the award, said that, in declining to make any award for lost earnings consequent on the unlawfully discriminatory dismissal and in limiting the award for injury to feelings to the final act of dismissal, the tribunal had failed to apply the tortious principles referred to in section 8(3) of the 1995 Act. It was clear that the employee had lost confidence as a result of what might properly be described as the discriminatory treatment culminating in his dismissal. Though there had been no complaint under section 5(2) of the Act, that did not render any failure by the employers to make reasonable adjustments immaterial to the complaint under section 5(1). The employee's eventual loss of confidence was related to, not independent of, the discrimination under section 5(1), itself rendered unlawful in part by the failure to make reasonable adjustments by virtue of section 5(5). It was thus material to the assessment of loss flowing from the statutory tort. The correct approach to the question of loss under section 8(3) was to ask what were the chances, if the employer had complied with his statutory duty under the Act, that the employee would have retained his employment. In the present case, that depended on a combination of a finding as to the proper adjustment to be made and a finding on medical evidence as to whether the employee would have recovered sufficiently to take up an alternative post. Further, the employment tribunal had artificially restricted compensation for injury to feelings to the single act of the second dismissal. It was for the tribunal to assess the effect of the employers' actions related to their treatment of the employee's disability which culminated in the unlawful act, i e the final dismissal.

Wight v East Riding of Yorkshire Council; 18 April 2002; EAT/101/01
EAT: Judge Peter Clark, Mr J R Crosby and Mr P R A Jacques

EFFECTIVE DATE OF TERMINATION

An employment tribunal held that, where an employee had presented an originating application complaining of unfair dismissal before the employers were aware that he had resigned from his employment, the effective date of termination of his employment was the date the application was presented to the tribunal, and ruled that the application had been duly presented before the end of the period of three months beginning with the effective date of termination as required by section 111(2) of the Employment Rights Act 1996.

LORD JOHNSTON, allowing an appeal by the employers, said that the employers submitted that, for there to be an effective date of termination of a contract by resignation, the resignation had to be intimated to the employer by the employee, at least to the extent that the employer would thus become aware of the employee's position. It was said, therefore, that the earliest date to be regarded as the effective date of termination would be four days after the presentation of the originating application when the employers received a letter of resignation from the employee; and that the application had been presented before the three-month period began. Given the decision in *Edwards v Surrey Police* (Recent Points [1999] ICR Part 4), the employment tribunal's decision that the effective date of termination was the date when the application was presented was plainly wrong because no intimation of the resignation had been given to the employers at that time. It followed that the effective date of termination was the date of the employee's letter. The issue then was whether the time period specified in section 111(2) was a closed period beginning with the date of termination or whether all that mattered was that the application was presented at some stage before the expiry of three months from the date of termination which could be any time before that date. It was plainly Parliament's intention only to open jurisdiction once there had been an effective date of termination. To hold otherwise would admit an open-ended period as far as the beginning was concerned and that flew in the face of the language of the subsection. To be competent an application claiming unfair dismissal had to be lodged with the tribunal within the period of three months beginning with the effective date of termination. In the present case that had not been done since it had been lodged before the effective date of termination and the tribunal had no jurisdiction to hear the complaint.

Stagecoach in Fife v Higgins; 28 February 2002; EAT/1127/01
EAT(Sc): Lord Johnston, Mr A J Ramsden and Dr W M Spiers

EQUAL PAY

An employment tribunal struck out an applicant employee's equal pay claim in respect of like work as frivolous, as having no prospect of success, on the ground that any meaningful comparison as to the chosen comparators doing like work to the applicant had ceased more than six years before the presentation of the originating application.

LINDSAY J, allowing an appeal by the applicant, said that the use of the present tense in section 1(2)(a) and (4) of the Equal Pay Act 1970 had given rise to an argument that the comparison required by the Act was one between a man and a woman contemporaneously in the same employment and doing like work, but such a construction would have conflicted with the broad purpose of article 119 (now article 141 EC) of the EC Treaty, which required each member state to give effect to the principle of equal pay for male and female workers for equal work or work of equal value. In *Macarthys Ltd v Smith* (Case 129/70) [1980] ICR 672, 690, para 11, the view that contemporaneity was not required was upheld by the Court of Justice. The appeal tribunal could see no source for the six-year comparator bar. There was no formal rule of law that only the circumstances attendant on a chosen comparator in the period of six years before the presentation of an originating application could be relied on as a matter of effective comparison by an applicant. The six-year comparator bar was not a requirement of law. The applicant's union were right to argue that the six-year rule applied only to the period for which compensation could be sought and not to the period of the events with which comparison could be made. While the applicant's reliance on comparison with the comparators at distant times would be likely to put considerable difficulties in her way, they were difficulties of fact not law and needed to be resolved on the evidence. The tribunal had erred in law, as, instead of looking in to the evidence, it had felt able to dispense with such inquiry and rule on the issue as if it was one of law, one of frivolity and fitness for a striking out.

Kells v Pilkington plc; 2 May 2002; EAT/1435/00
EAT: Lindsay J, Mr P Dawson and Mrs D M Palmer

PRACTICE

In proceedings by applicant employees complaining that they had been unfairly dismissed, the respondent employers applied for an order requiring the applicants to retain different solicitors from the firm representing them on the ground that, that firm having recently acted for the respondent, there was a conflict of interest which affected the respondent's right to a fair hearing under article 6 of the European Convention on Human Rights. The employment tribunal chairman, applying *Bache v Essex County Council* [2000] ICR 313, refused the application.

WALL J, dismissing an appeal by the respondent, said that the respondent argued that the chairman had erred in holding that section 6(1) of the Employment Tribunals Act 1996 rendered the tribunal powerless to order a party's solicitor to cease to act where there was a conflict of interest, given the overriding objective under regulation 10 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2001 and the tribunal's powers under rules 4 and 11 of the Rules of Procedure. It was said that *Bache* was distinguishable; that its effect was merely that a tribunal could not compel a party to be unrepresented. The applicants submitted that the employment tribunal, and the appeal tribunal, which were creatures of statute, had no power to prevent a representative chosen by a party from acting for that party. Though, at first blush, when section 6 was considered in the context of article 6 of the Convention, that appeared a somewhat startling proposition, the appeal tribunal were satisfied that it was sound, that *Bache* applied and that there was no error in the chairman's ruling. The right to a fair hearing under article 6 did not require section 6 to be read as though it enabled the tribunal to require a party to dispense with his chosen representative. *Bache* established a very important point of principle and was binding. The existence of any power to interfere with representation before the employment tribunal would require clear statutory authority, and that was not provided either by the Human Rights Act 1998 or the introduction of the overriding objective. In any event, considering the matter on its merits, neither the applicants nor their solicitors took the view that there was a conflict of interest, and the solicitors had, furthermore, sought advice on the propriety of continuing to act from the professional ethics department of the Law Society and also asserted that they had acquired no confidential information relating to the respondent. The appeal failed both on the issue of principle and on the merits.

Dispatch Management Services (UK) Ltd v Douglas; 4 December 2001; EAT/902/01
EAT: Wall J, Mrs D M Palmer and Mr G H Wright

RACE DISCRIMINATION

An applicant complained that the Prison Service had discriminated against him on racial grounds, inter alia, when he failed an assessment test, taken with a view to his becoming a prison officer. The employment tribunal concluded that the applicant had been unable to demonstrate that S, a candidate of a different race to the applicant, did not meet the standards required and that there was no evidence that the applicant had been treated any differently to S; and it dismissed the complaint.

JUDGE WILKIE QC, dismissing an appeal by the applicant, said that the applicant submitted that the tribunal's decision did not pose, specifically, the relevant questions and, by failing to do so, the tribunal had fallen into error in failing to consider, as a comparison exercise, the position of a hypothetical comparator. On the face of it, the respondent accepted that, the applicant's case being presented on the basis of an actual comparator, S, the tribunal, in its process of reasoning, had not had regard to any hypothetical comparator. The applicant relied on *Lindsay v Alliance & Leicester plc* [2000] ICR 1234 and two unreported decisions of the Employment Appeal Tribunal: *Hackney London Borough Council v Fashola* (12 January 1996) and *Jarman v Stenning*. In each of those cases, however, it seemed clear that the requirement was to look at the hypothetical comparator as an alternative to looking at a real comparator, such that, if there was a real true comparator with whom a comparison might be made, and the tribunal made that comparison, it was not then obliged to construct a hypothetical comparator. The logic of that seemed clear, and it was hard to see how any sensible construction of a hypothetical comparator could lead to any different result than arose from the comparison with the true comparator. *Balamoody v United Kingdom Central Council for Nursing Midwifery and Health Visiting* [2002] ICR 646, where there was no true comparator, did not assist the applicant's contention that where there was a true comparator there was a further duty to construct a hypothetical comparator. That submission was rejected. S had been put forward as a true comparator, in so far as it was his performance on the assessment exercise that was being compared with that of the applicant, and the tribunal had accepted his example as a true comparison. Even if there was an obligation to construct a hypothetical comparator, the way in which the tribunal had explained itself satisfied that requirement.

Williams v Prison Service; 7 February 2002; EAT/1236/00
EAT: Judge Wilkie QC, Ms S R Corby and Dr D Grieves

SEX DISCRIMINATION

An employment tribunal rejected a claim by a pregnant employee that she had been discriminated against by her employer contrary to the Sex Discrimination Act 1975 on the ground that, although the employer had failed to make a risk assessment in breach of regulation 16(1)(b) of the Management of Health and Safety Regulations 1999, the employee had not been treated less favourably than a man or non-pregnant woman in that the employer would not have undertaken a risk assessment for any of her employees.

JUDGE McMULLEN QC, allowing an appeal by the employee, said that *Day v T Pickles Farms Ltd* (Recent Points [1999] ICR Part 7) clearly indicated that a failure to carry out a risk assessment could be a detriment within the meaning of the Sex Discrimination Act 1975. The employment tribunal were bound by that judgment and ought to have applied it. In the extended reasons the tribunal said that they were being asked to widen the definition of discrimination to encompass a failure of an employer to treat a woman more favourably than a man. The proper approach was to construe the 1975 Act by reference to the Equal Treatment Directive 76/201/EEC and the Pregnant Workers Directive 92/85/EEC. It was not necessary for the treatment of the employee by the employer to be compared with the employer's treatment of a comparable male employee or non-pregnant female employee: see *Webb v Emo Air Cargo (UK) Ltd (No 2)* [1995] ICR 1021. If the basis of the treatment was pregnancy, it was unlawful, irrespective of the employer's comparable treatment of men, or non-pregnant women. The proper approach in construing treatment was to consider not just dismissal but working conditions. The protection of a woman's biological condition during and after pregnancy indicated a special relationship which had to be protected. One way in which it was protected was by carrying out a risk assessment pursuant to the 1999 Regulations. Failure to do so impacted disparately on pregnant workers and was discrimination. The employment tribunal had erred in their approach to the application of the 1975 Act. They had failed to construe it so as to give effect to the Pregnant Workers Directive and to apply the 1999 Regulations to the allegation of sex discrimination made by the employee.

Hardman v Mallon (trading as Orchard Lodge Nursing Home); 25 March 2002; EAT/360/01
EAT: Judge McMullen QC, Mr D A C Lambert and Miss A Mackie

TIME LIMIT

An originating application making a complaint of unfair dismissal, posted to the tribunal a week before the expiry of the three-month time limit in section 111 of the Employment Rights Act 1996, did not arrive until a month later. The employment tribunal, ruling that it had no jurisdiction to hear the complaint under section 111(2), found that, had the application been received in the normal course of the post, it would have been presented in time, but that, as there had been only a few days to the expiry date when it was posted, the applicant ought to have checked with the tribunal office that it had arrived, and that it had been reasonably practicable for the application to have been presented in time.

JUDGE WILKIE QC, allowing an appeal by the applicant, said that, on the authorities, there was a world of difference between a case in which an applicant acting in person submitted an application in good time—so that in the normal course of post it would be received in time and no alarm bells rang when the tribunal, as in the present case, took several weeks to acknowledge its receipt—and the case where an applicant acted through solicitors, whose professional duty encompassed having in place systems to alert them when applications, sent in good time, were not acknowledged as having been received in what they knew to be the normal course of business. The employment tribunal had failed to have regard to the fact that, in the present case, the applicant was acting in person, not represented by solicitors, and, as a consequence of that, it had applied a test of prudence appropriate to solicitors. The tribunal had failed to pose the question which would frequently be, and in the present case was, highly relevant, namely, whether the fact that the application had not arrived in time was substantially the fault of the applicant. A person acting without the benefit of legal advice was entitled to assume that a document would arrive in the normal course of the post. It would be an unreasonable imposition on such an applicant to require her to contact the tribunal office. In the present case the three weeks or so delay was reasonable, and there was no prejudice to the respondent in the appeal tribunal deciding that the employment tribunal did have jurisdiction to determine the applicant's complaint.

Grossman v Barnet Healthcare; 22 February 2002; EAT/134/01
EAT: Judge Wilkie QC, Mr T C Thomas and Mr N D Willis

COMPENSATION

An employment tribunal upheld an employee's complaint of unfair dismissal on the ground that the employers had not sufficiently investigated the employee's misconduct. Without affording counsel the opportunity to make submissions on contributory conduct, the tribunal went on to hold that the employee's compensation should be reduced by 75% on the basis that there was only a 25% chance that he would not have been dismissed had the dismissal been procedurally correct.

MR RECORDER LANGSTAFF QC, allowing an appeal by the employers, said that it was an elementary principle of law and procedure, sometimes referred to as a principle of natural justice, that each party had a right to be heard. Part of that principle necessarily involved a party having the opportunity within reason to address the tribunal on the issues before it. Where a tribunal reached a decision on a discrete issue without giving the opportunity to either party to address that issue, there would be a failure of natural justice. If the judgment that had to be made to establish the percentage was to be regarded as a separate legal issue, it was not one which the parties had been invited to address. If, however, it was to be regarded not as a discrete legal issue but as part and parcel of the determination of unfairness, then it would not necessarily be required of the tribunal to ask the parties for their submissions. Essentially, the appeal turned on whether the determination of the "*Polkey* percentage" was a determination of a separate legal issue. It was argued on behalf of the employee that, given that there was an obligation on an employment tribunal to reach a determination as to that percentage and given that the tribunal was equally entitled, as *King v Eaton Ltd (No 2)* [1998] IRLR 686 demonstrated, in some circumstances at least to refuse to hear further evidence on that issue, a tribunal was equally entitled not to hear submissions on the evidence it had heard before reaching a determination. That submission was rejected. First, *Polkey v A E Dayton Services Ltd* [1988] ICR 142 itself drew a distinction between procedural fault and the economic consequence in terms of compensation for that fault. Secondly, it was common ground that the tribunal were engaged on a hearing as to liability first and were not engaged on any issue related directly to compensation. Counsel for the employee properly conceded that, if the tribunal had come to a conclusion following deliberation as to the amount of compensation to be paid without inviting any further evidence or submissions, there would have been a clear sense of injustice. The present position was analogous. Further, it was customary for tribunals to invite advocates to make submissions as to the percentage chance in respect of the *Polkey* deduction. That recognised the fact that it was not naturally evident to an advocate that the point arose as being bound up inextricably with a decision as to the unfairness of the dismissal. Accordingly, where a tribunal had before it a case in which it was considering reaching a decision that a dismissal was unfair on procedural grounds, then, unless it had given the parties an opportunity to address it as to that aspect of the case before retiring, it should raise with the parties the possibility that submissions might make a difference to the determination before proceeding to place a figure on it. The tribunal was not entitled to resolve an issue in the absence of submissions by the parties where that issue was of fundamental importance to the amount of compensation.

Market Force (UK) Ltd v Hunt; 10 April 2002; EAT/393/01
EAT: Mr Recorder Langstaff QC, Mr W Morris and Ms H Pitcher

EMPLOYMENT APPEAL TRIBUNAL

At the preliminary hearing of an appeal by an applicant against the dismissal, by an employment tribunal, of her complaint against a respondent claiming sovereign immunity, the Employment Appeal Tribunal formed the view that it was arguable that the provisions of the State Immunity Act 1978 infringed article 6 of the European Convention on Human Rights in the circumstances giving rise to the appeal. The appeal tribunal made an order permitting the appeal to proceed to a full hearing but staying that appeal pending the judgment of the European Court of Human Rights in *Fogarty v United Kingdom* [(2001) 34 EHRR 302]. The respondent High Commission, while asserting that there had been no submission to the jurisdiction, invited the appeal tribunal of its own initiative to review that order and dismiss the appeal, contending that the appeal was unrelated to the pending decision in *Fogarty* and that by virtue of the commission's sovereign status the appeal tribunal did not have jurisdiction to make an order allowing the applicant's appeal to proceed.

MISS RECORDER SLADE QC, declining to review the order, said that on 21 November 2001 the European Court of Human Rights held that there had been no violation of article 6(1) of the Convention in *Fogarty*, and, as suggested by the High Commission, no doubt to avoid any argument that it had submitted to the jurisdiction, the appeal tribunal would consider of its own motion whether its earlier order should be reviewed. The power of the appeal tribunal to review its orders was contained in rule 33 of the Employment Appeal Tribunal Rules 1993 and had been considered in *Blockleys plc v Miller* [1992] ICR 749 and *Digital Equipment Ltd v Clements (No 2)* [1997] ICR 237 in which Morison J observed, at p 240B, that the appeal tribunal "has no power to hear an appeal against its own decision and should not purport to do so". The High Commission had invited the appeal tribunal to review its earlier decision on the basis of a re-assertion of statutory state immunity and an argument that the judgment in *Fogarty* was immaterial to the current appeal as Mrs Fogarty's claim was based on an allegation of sex discrimination, whereas the applicant's claim was based on an alleged breach of contract. The appeal tribunal was of the view that those arguments invited a rehearing of the preliminary hearing of the appeal; and, on a proper construction of rule 33 in the light of *Blockleys* and *Digital Equipment*, the appeal tribunal was not satisfied that the grounds on which it was invited to exercise its review jurisdiction enabled it to do so.

Onwuemene v Nigerian High Commission; 14 March 2002; EAT/13/01
EAT: Miss Recorder Slade QC, Mrs T A Marsland and Mrs D M Palmer

STRIKING OUT

An employment tribunal chairman struck out an applicant's complaint of sex discrimination after neither the applicant nor her representatives had attended an interlocutory hearing and he had found it "hard to accept" the representative's explanation that she had entered the wrong date in her diary. The chairman held that, although the originating application did not set out the facts, it was not itself frivolous or vexatious, but that the manner in which the proceedings had been conducted by and on behalf of the applicant had been frivolous or vexatious.

LINDSAY J, allowing an appeal by the applicant, said that there was no event or fact which could have led to the applicant herself being held to have been frivolous or vexatious against the background of the matter being conducted largely, or wholly, by a representative. It would seem that it was the conduct of the representative, therefore, that gave rise to the offending conduct, but the representative's conduct was not to be held to be wilful or contumelious. There was no suggestion of a deliberate abuse of process, nothing by way of behaviour intended to be contemptuous of the court. Though it was not right to draw very close parallels between the position in the High Court and the position in the employment tribunals, what was just in one was likely to be just in the other; equally, what was unjust in one was likely to be unjust in the other. Even before the recent reforms in the High Court it was relatively unusual for a case to be struck out for conduct where there was nothing contumelious about the conduct and where there had been no "unless order". One important consideration seemed not to have loomed at all in the chairman's thinking in his decision to strike out. That was how far the failure of the representative to attend the interlocutory hearing had materially prejudiced a fair trial of the case, it being remembered that the chairman did not find the pleadings themselves to be frivolous or vexatious. He did not say that the representative's reasons for non attendance were not to be believed, but that they were "hard to accept". What he had before him was a case that could not be regarded as one of wilful default or contumelious error on the part of the representatives but simply total incompetence or negligence on their part. The chairman never addressed the question which the appeal tribunal regarded as an important one, namely, whether a fair trial truly was prejudiced by the non attendance. It was an error of law not to address that crucial factor, though that was not to say that it would necessarily have been determinative.

Lee v Police Information Technology Organisation; 18 February 2002; EAT/185/01
EAT: Lindsay J, Mr D A C Lambert and Mr K M Young

UNFAIR DISMISSAL

An employment tribunal held that, by failing to consult the applicant employee or to take steps to determine whether alternative employment was available, the respondent employers had acted unreasonably, in terms of section 98(4) of the Employment Rights Act 1996, when they failed to renew the employee's fixed term contract; and the tribunal upheld the employee's complaint of unfair dismissal.

LORD JOHNSTON, dismissing an appeal by the employers, said that the employers submitted that the employment tribunal had misdirected itself in law in that it did not apply its mind to the test relating to the "band of reasonable responses", and had, in any event, determined, contrary to authority, that a failure to consult automatically rendered a dismissal unfair when related to redundancy. The appeal tribunal was of the opinion that when the issue was one of redundancy, in the sense that the reason for dismissal had been established as such, the test of the band of reasonable responses had no operation. That was an appropriate way to assess the reasonableness of an employer's conduct in the context of misconduct, but, in the context of redundancy, which was a decision made by the employer, there was no factor which required a response. What the statute enjoined the employer to do, having embarked on a redundancy process, was to act fairly and reasonably in carrying out the selection process. Reference had been made to *Chronos Richardson Ltd v Watson* (Recent Points [2001] ICR Part 5) in which the appeal tribunal referred to "range of reasonable conduct". The word "conduct" was wholly appropriate in the context of assessing the reasonableness of the employer's actions and was nothing to do with the narrower test of band of reasonable responses which had relevance and importance in the context of dismissal based on misconduct after an investigation had been carried out. The "response" was to the investigation and its results. In the circumstances, while the appeal tribunal accepted that lack of consultation in itself did not render dismissal for redundancy automatically unfair, if it was clothed, as in the present case, with an additional factor, namely, failure to investigate alternative employment, which would have been bound to arise in the consultation process had it been undertaken, the matter became both broader and easier to assess. The employment tribunal had properly considered the employers' conduct in that context and had determined the correct question, namely, that the employers did not act reasonably in failing to consult and to consider alternative employment.

Dundee City Council v Selbie; 3 May 2002; EAT/1060/01
EAT: Lord Johnston, Dr A H Bridge and Mr R P Thomson

WAGES

On her claim for unlawful deduction from wages in respect of unpaid overtime, an employment tribunal awarded an employee payments for hours worked in excess of the maximum number of 48 hours a week including overtime prescribed by regulation 4(1) of the Working Time Regulations 1998.

JUDGE PETER CLARK, allowing an appeal by the employers, said that the starting point was the express term of the employee's contract of employment which provided that overtime rates were payable only if overtime was specifically authorised in writing. There was no evidence that such authorisation had ever been given. Regulation 4(1) did not assist the employee in her overtime claim, whether by way of unlawful deduction or breach of contract, for the following reasons. Regulation 4(1) said nothing about a worker's entitlement to overtime payments, and, assuming that the employers had breached regulation 4, by requiring the employee to work in excess of 48 hours per week, and were thereby in breach of a statutorily implied term of the contract, such breach did not sound in damages and could not form the basis for an unlawful deduction claim under section 13(3) of the Employment Rights Act 1996. The enforcement machinery provided for in the 1998 Regulations did not extend to a right to compensation for breach of regulation 4 per se. Regulation 30(1) listed those breaches of specific provisions leading to an order for the payment of compensation. Regulation 4 was not included in the list. It was important to appreciate the purpose of regulation 4 and the underlying Directive 93/104/EC. It was to protect the health and safety of workers and the remedies for non compliance were contained in sections 45A and 101A of the 1996 Act. It followed that the tribunal erred in finding that the employee was legally entitled to overtime payments such that a failure by the employers to make such payments amounted to an unlawful deduction from wages.

Forbuoys Ltd v Rich; 19 April 2002; EAT/144/01
EAT: Judge Peter Clark, Mrs D Palmer and Mr H Singh

DISCIPLINARY PROCEEDINGS

An employer's disciplinary code provided under the heading "gross misconduct" that summary dismissal would occur when an employee behaved in such a manner that it was unreasonable to expect the company to accept or risk a continuation or repetition of the same or similar behaviour and a list of categories of conduct followed which included abusive, objectionable or threatening behaviour to employees. It was also provided that in all cases of disciplinary action the need to satisfy the test of reasonableness applied and mitigating factors would be taken into account. An employee, who was summarily dismissed for gross misconduct following an incident when he swore and threw down a telephone receiver which then struck another employee, had his complaints of unfair dismissal and wrongful dismissal upheld by an employment tribunal.

MR RECORDER BURKE QC, dismissing an appeal by the employer against the finding of wrongful dismissal, said that the employer submitted that the express terms of the contract were such that the tribunal was not entitled to consider whether the conduct complained of was gross misconduct in the ordinary sense, i e so serious as to be repudiatory, but was entitled to consider only whether the conduct fell within the contractual definition, namely, any behaviour which fell within the categories listed however trivial. The effect of setting out categories in the contract, however, was to establish between the parties what kind of conduct might be regarded by the employer as gross misconduct; in the absence of sufficiently specific words, it did not produce the result that conduct falling within one of the categories was automatically to be treated as sufficient to justify summary dismissal, however trivial that conduct might be; and the tribunal was not shut out from considering, and needed to consider, whether the conduct relied on was sufficiently serious to be repudiatory. In *Neary v Dean of Westminster* [1999] IRLR 288, 291 Lord Jauncey of Tullichettle said that conduct justifying dismissal "must so undermine the trust and confidence which is inherent in the particular contract of employment that the master should no longer be required to retain the servant in his employment". There was no reason, in the absence of clear words to the contrary, why that well established principle should not apply in the present case. Even if that conclusion was wrong, the particular contractual terms in the present case produced a position more favourable to the employee than in a case where there were no contractual terms at all; at common law consideration of whether the conduct complained of was repudiatory would not involve consideration of overall reasonableness or mitigating factors. The words "the test of reasonableness" in the contractual provisions were sufficiently broad to require the tribunal to consider, in deciding whether the dismissal was wrongful, all the facts and matters which could sensibly be relevant to the question whether it was reasonable for the employer summarily to dismiss. Thus procedural defects on the part of an employer might be relevant, even though the tribunal concluded that the conduct complained of had been committed. Similarly, having regard to the contractual terms, the tribunal was bound to take into account mitigating factors. On the findings of fact made by the tribunal, their conclusion that the dismissal was wrongful was not perverse.

British Bakeries Ltd v O'Brien; 26 April 2002; EAT/1479/00
EAT: Mr Recorder Burke QC, Mr J R Rivers and Mr A D Tuffin

MINIMUM WAGE

An employer was served with an enforcement notice issued by a compliance officer under the National Minimum Wage Act 1998 requiring the employer to pay at least the national minimum wage to an employee and ordering, pursuant to section 19(2), the payment of £4,925.90 to the employee, which the compliance officer determined as the shortfall of what should have been paid on the basis of information given to him by the employee. On an appeal by the employer, the employment tribunal concluded, with regard to the payment required by the notice, that the evidence was so unsatisfactory as to the hours worked by the employee that it was wholly unsafe to draw any conclusion from which a calculation could be made, and it ordered the enforcement notice to be rectified by striking out the provision for payment.

MR RECORDER LANGSTAFF QC, allowing an unopposed appeal by the Inland Revenue, said that, if it was established by an employer to the satisfaction of the employment tribunal, under section 19(6)(c)(ii), that an enforcement notice was in error in specifying the wrong sum due to the worker, the employment tribunal were under a duty, under section 19(8), to insert the right figure. On their own recitation of the facts, it appeared that the evidence had satisfied employment tribunal, and therefore the employer had established, that the amount specified in the enforcement notice was incorrect. The tribunal should then have proceeded to do their duty under section 19(8) to rectify the notice. Given that duty, and given that no burden of proof applied to that exercise, what was required of the tribunal was to do the best they could on the material available to provide the best estimate of the amount that should have appeared in the notice. But the tribunal could not decide that the task was so difficult that they would simply award no payment at all. They had to give their best estimate, accepting all the imperfections and uncertainties of the material before them. The matter would be remitted to the same tribunal for a determination under section

19(8). They would no doubt wish to hear such further evidence as either the employer or the appellant sought to put before them, but the scope of the inquiry was simply into what figure there should be in rectification of the enforcement notice as to the amount due to the employee in respect of the best estimate of the hours that she had worked.

Inland Revenue Commission v St Hermans Estate Co Ltd; 2 May 2002; EAT/121/01
EAT: Mr Recorder Langstaff QC, Ms N Amin and Mr D J Hodgkins

REDUNDANCY PAYMENT

Redundancy payments for three applicant ancillary school workers, whose contracts required them to work for only 44 weeks each year, were calculated by their employer on the basis of a week's pay arrived at by dividing their annual salary by 52. Complaints by the applicants that one week's pay should have been calculated as 1/44th of the annual salary were dismissed by an employment tribunal chairman.

WALL J, allowing an appeal by the applicants, said that the chairman had been persuaded to uphold the employer's calculation in the main by the point that payments of salary were made to the applicants monthly throughout the year, and that each was, therefore, employed throughout the year. The case had been argued before the appeal tribunal on the basis that the applicants' contracts of employment were annual, though there appeared to be a highly arguable case to the contrary. But the reality at the heart of each contract was that the applicant was paid to work for a total of 44 weeks a year and was not required to work, did not work and was not paid to work in the remaining weeks of the year. In the context of the terms of the contract, it was difficult to regard the manner of payment "in 12 equal instalments" as being anything other than an administrative convenience. It did not follow, because the applicants' pay was artificially divided into 12 monthly instalments, that, for the purposes of section 221(2) of the Employment Rights Act 1996, their remuneration for employment in normal working hours did not vary with the amount of work done in the period. The remuneration did vary—not during the weeks they actually worked—but during the weeks they did not work at all. The applicants' "normal working hours" must mean the hours they worked in a normal working week. The phrase could not mean no hours in weeks when they were plainly not required to work. A week's pay had to relate to a week's work. Since the applicants were required to work, and were paid to work, for only 44 weeks it seemed just that their modest redundancy payments should be calculated on the basis of the weeks they actually worked and not on the basis of a notional 52-week calculation which took into account weeks they did not work and for which they were not paid to work.

Gilbert v Barnsley Metropolitan Borough Council; 12 April 2002; EAT/674/00
EAT: Wall J, Mrs J M Matthias and Mr D Norman

REVIEW

The response, on 12 May 2000, to an applicant's application for a review of the decision of an employment tribunal was that the chairman had directed that the application should be heard by the tribunal and that a notice of hearing would be sent shortly. On 12 June 2002, no date having by then been fixed, the applicant was sent a further letter stating that, on further consideration, the chairman had revoked his earlier decision and that, in exercise of his powers under rule 11(5) of the Employment Tribunals Rules of Procedure 1993, he refused the application for a review on the ground that it had no reasonable prospect of success.

LINDSAY J, dismissing an appeal by the applicant against the refusal of his review application, said that, on the merits, the chairman had been entitled to take the view that the review had no reasonable prospect of success. The question was whether there was procedural error in the change between his first and second letters. Rule 11(5) of the Rules of Procedure provided no deadline by which the chairman's power to refuse, if it was to be exercised at all, had to be exercised. It did not say that the power could not be exercised if some indication had been given under rule 11(6). It did not say that the power could not be declined once and then exercised after all. There was nothing to say that the power under rule 11(5) was spent once a general indication had been given that there would be a hearing under rule 11(6), still less that rule 11(5) was spent even before a notice of hearing was given under rule 11(6). There was no time beyond which the ability to refuse under rule 11(5) became specifically inoperative, except impliedly, from the terms of rule 11(6), that power under rule 11(5) must become inoperative once the hearing of the tribunal under rule 11(6) had been started. That was, impliedly, the final point at which the power under rule 11(5) must become incapable of exercise. There was no need to imply some time limit that was not expressly put there, or even to create a reference to some events or circumstances which were not expressly referred to. Until the hearing of a review application by the employment tribunal began the chairman's power under rule 11(5) remained open to be exercised by him. Though it was not to be encouraged that the matter should have been dealt with as it was, there was no error of law in the chairman's decision.

Ece v Newham London Borough Council; 22 February 2002; EAT/1035/00
EAT: Lindsay J, Mr I Ezekiel and Mr G H Wright

STRIKING OUT

At the hearing, in November 2000, of an employee's complaint, inter alia, of unfair dismissal, the first respondent, the employee's former employer who had sold his business to the second respondent, applied to strike out the originating application, alleging that the employee had failed to comply with directions. The tribunal decided to strike out the originating application under rule 13(2)(e) of the Employment Tribunals Rules of Procedure 1993 on the ground that the conduct of the proceedings had been vexatious.

JUDGE REID QC, allowing an appeal by the employee, said that the tribunal decided that it was not necessary for the employee to have been given notice of the application to strike out because she was present and represented by her husband who was given an opportunity to show cause orally why a striking-out order should not be made. That was at best a doubtful decision because it meant that the husband had to deal with the matter without any opportunity to consider or formulate his arguments against it. Looking at the matters of complaint relied on by the tribunal in striking out, there were doubts as to whether their draconian decision was one which they ought to have taken, even on their view of the law. However, it was clear that they did not have available authorities now conveniently gathered together in the judgment of the Employment Appeal Tribunal on 20 March 2002 in *Wilson v De Keyser Ltd* and did not, as they should have done, take into account the issue of whether or not a fair trial could still take place. Although there were some issues of fact in the case, they were of a comparatively limited nature and there was nothing to suggest that it would not now be possible for the case to be tried fairly. In those circumstances, the tribunal were wrong in law to reach the conclusion they did and they should have rejected the application to strike out. It was clear that there had been a transfer of an undertaking and that under regulation 5(2) of the Transfer of Undertakings (Protection of Employment) Regulations 1981 any liability the first respondent might have had now fell on the second respondent. The appropriate course was, therefore, to remit the matter for hearing by a different tribunal as against the second respondent only.

Preedy v Smith (trading as Easterhill Furniture); 26 April 2002; EAT/193/01
EAT: Judge Reid QC, Mr B V Fitzgerald and Ms G Mills

TIME LIMIT

An applicant employee was dismissed on 21 May 1999 when his employer's premises were destroyed by fire. Shortly afterwards, he and two fellow employees obtained Form IT1s, completed them by claiming redundancy payments and sent them off to the employment tribunal, but they were not received. In January 2000, when the applicant heard that another employee had had his case determined by an employment tribunal, he presented a second complaint, outside the six-month limitation period in section 164(1) of the Employment Rights Act 1996. An employment tribunal chairman decided that it would not be just and equitable to extend time under section 164(2) and dismissed the applicant's claim.

JUDGE PETER CLARK, allowing an appeal by the applicant, said that the applicant submitted that the chairman ought to have elicited from him the fact that his literacy was severely handicapped from a hearing disability as a child and that was a relevant factor which fell to be considered. That could not be accepted. There was no duty on the employment tribunal to tease out evidence which a party had forgotten to adduce at the hearing. The inexperience or incompetence of the party was not a relevant consideration on appeal. Reference had been made to *Harvey on Industrial Relations and Employment Law*, vol 1, E[2137.01] where, in relation to section 164(2) and (3), it was stated: "The relevant question for the employment tribunal includes whether the applicant is, in a broader sense, deserving of a redundancy payment." That bold statement was unhelpful and potentially misleading. It might suggest an unlimited discretion to award a redundancy payment to an applicant who had not complied with section 164(1) in a deserving case. The employment tribunal had a wide discretion to extend time if in all the relevant circumstances it was just and equitable to do so. Those circumstances had to relate to the late application, not the underlying merits of the claim, subject to the limited inquiry as to merits suggested by Phillips J in *Hutchison v Westward Television Ltd* [1977] ICR 279. On that footing, the editors correctly stated the position at E[2138]. The question was whether the chairman had failed to consider "all the other relevant circumstances" referred to in section 164(3)(b). The applicant correctly submitted that the tribunal's approach to the questions raised by section 164(2) and (3) mirrored those raised by section 76(5) of the Sex Discrimination Act 1975 and section 68(6) of the Race Relations Act 1976. In *British Coal Corpn v Keeble (No 2)* [1997] IRLR 336 Smith J endorsed guidance given when exercising the just and equitable discretion under the 1975 Act that tribunals should adopt as a check list the relevant mandatory factors in section 33 of the Limitation Act 1980, and that approach was expressly approved in *Director of Public Prosecutions v Marshall* [1998] ICR 518. It was clear that the chairman had considered only the question raised by section 164(3)(a) of the 1996 Act, which equated with section 33(3)(a) of the 1980 Act. He did not go on to consider all the *other* relevant circumstances. By extension those included the factors listed at section 33(3)(b)–(e) as well as the balance of prejudice question. The matter would be remitted for rehearing by a fresh tribunal. At that hearing it would be open to the applicant to lead evidence as to his literacy not placed before the chairman on the last occasion.

Patchett v Greenwoods (Interiors) Ltd; 17 May 2002; EAT/634/00
EAT: Judge Peter Clark, Ms S R Corby and Mrs D M Palmer

[2002] ICR Part 10

CONTRIBUTORY FAULT

An employment tribunal, on an employee's complaint of unfair dismissal, concluded that the employee had not had a fair disciplinary hearing and, on balance, the dismissal was unfair, but that he was guilty of 100% contributory conduct, and it went on to reduce both the basic and compensatory awards by 100%, without giving the parties the opportunity to make submissions on the issue on contributory conduct.

MS RECORDER SLADE QC, dismissing an appeal by the employee, said that it was clear from sections 123(6) and 122(2) of the Employment Rights Act 1996 that there was power to reduce compensatory and basic awards to a nil amount. That power was unfettered; and the 100% reduction was plainly open to the tribunal on the findings of fact it made. The employee submitted that the tribunal had erred in failing to inform him that it was going to consider the question of contributory fault, thus depriving him of opportunities to adduce evidence and make submissions on the point. Employment tribunals were masters of their own procedure, and it was clear that the question of a nil award had been raised in the employer's notice of appearance; but it was also apparent that the tribunal had not informed the parties expressly that it would proceed to consider the question of deduction for contributory fault at the same time as considering the fairness of the dismissal. It was an aspect of the fair conduct of proceedings that parties should be informed by the tribunal of what it would consider and decide at each stage of the proceedings: see *Iggesund Converters Ltd v Lewis* [1984] ICR 544, 552G. It was the question of contributory fault that was most liable to give rise to confusion which could be avoided if employment tribunals made it clear when that issue would be considered. In the present case the tribunal had not done so. However, considering the arguments which the employee would have advanced had he been asked, no injustice had been caused by the failure to make clear to the parties that contributory fault would be considered at the same time as the tribunal considered the fairness of the dismissal.

Green v Robins & Day Ltd (trading as Warwick Wright Clapham); 22 May 2002; EAT/83/01
EAT: Ms Recorder Slade QC, Mr D J Jenkins and Mr P A L Parker

PRACTICE

At a pre-hearing review of an applicant's complaints of race and sex discrimination against 19 respondents, an employment tribunal ruled that the complaints against 16 respondents had no prospect of success and ordered the applicant to pay deposits as a condition of continuing with those complaints, pursuant to rule 7 of the Employment Tribunals Rules of Procedure 1993.

LINDSAY J, dismissing an appeal by the applicant, said that the applicant appealed on the ground, inter alia, that, contrary to rule 7(1) of the Rules, the employment tribunal had considered documents submitted by four respondents in their bundle. The appeal tribunal did not read rule 7(1) as precluding the tribunal from looking at material outside the originating application and notice of appearance, outside the representations in writing and outside the oral argument. They had to be considered but there was nothing to say that *only* those matters might be considered. For example, if the representations in writing in a contract case included reference to the contract, why should the contract itself not be referred to at the pre-hearing review? Moreover, if at the pre-hearing review in certain cases it became necessary to consider a party's means under rule 7(5), surely it would be open to the tribunal, and could not be seriously argued otherwise, that the means could be considered by reference to matters not in the originating application, not in the notice of appearance and not otherwise falling within rule 7(1). For example, surely in such a context it would not be improper for a tribunal to call for either an affidavit of means or for material documents such as payslips. There was nothing in rule 7(1) that made it automatically an error of law to consider documents going outside the specific headings of rule 7(1)(a)(b) and (c). What was relevant under rule 7(4) was necessarily somewhat limited and the fact that more documents chosen by the respondents were referred to than documents chosen by the applicant was, of itself, of no significance. The respondents had begun the case and so, necessarily, had to set it out and explain it in a way that later parties addressing the tribunal did not need to do. The appeal tribunal had been unable to find any error of law in the tribunal's decision.

Malkan v Chief Executive NHS Executive; 28 May 2002; EAT/1153/00
EAT: Lindsay J (President), Ms S R Corby and Mr P D Wickens

PROTECTED ACT

An employee who was alleging that he had been injured at work got a fellow employee to video the equipment concerned. When his solicitors disclosed the video to the employers' insurers, he was summoned to a hearing by his employers (who were concerned because the production process involved was confidential), at which he considered he was threatened that if he did not reveal who had made the video he would be sacked. He later resigned without giving a reason. On his complaint of unfair dismissal, he claimed he had been constructively dismissed and that the dismissal was unfair under section 103A of the Employment Rights Act 1996 (inserted by the Public Interest Disclosure Act 1998) because the reason for his dismissal was that he had made a protected disclosure. The employment tribunal, dismissing the complaint, found that the employee had not been threatened as he alleged, that he had resigned of his own accord for his own reasons, that the making of the video could be a qualifying disclosure within section 43B(1)(d) of the Act but that the employee had not suffered any detriment thereby.

JUDGE REID QC, dismissing an appeal by the employee, said that, on the evidence, the tribunal had been entirely entitled to reach the conclusion that the employee left for his own reasons and not because of anything done or threatened by his employer. Though that disposed of any question of there being victimisation because of a protected disclosure, the appeal tribunal had reservations about the mere making of the video being a protected disclosure. That there was a protected disclosure at the point when the video was produced to the employee's solicitors was clear, and the introduction of an outsider who could witness the confidential process and make a video could be a protected disclosure, but the appeal tribunal was unconvinced that the making of the video by itself (if made by a fellow employee to whom nothing new was disclosed) amounted to a protected disclosure. For there to be detriment under section 47B of the 1996 Act "on the ground that the worker has made the protected disclosure", the protected disclosure had to be causative in the sense of being "the real reason, the core reason, the causa causans, the motive, for the treatment complained of" to borrow the words of Lord Scott of Foscote in the race relations case of *Chief Constable of the West Yorkshire Police v Khan* [2001] ICR 1065, 1082. Similarly, if the detriment was (as was suggested) dismissal, the making of the protected disclosure had to be the reason or principal reason for the dismissal. In the present case, not only was there no dismissal, but the steps taken by the employer were not because of any protected disclosure that tended to show "that the health or safety of any individual has been, is being or is likely to be damaged"; it was solely because of the perceived breach of confidentiality of the production process.

Aspinall v MSI Mech Forge Ltd; 25 July 2002; EAT/891/01
EAT: Judge Reid QC, Mrs D M Palmer and Mr A D Tuffin

STAY

A female police constable brought a complaint of sex discrimination against the commissioner of police, alleging that she had been exposed to sexual harassment by a police sergeant at a police station where she had been serving. In December 2001 a chairman, sitting alone, rejected a submission by the commissioner that the complaint should be stayed in the light of the Employment Appeal Tribunal's decision in *Chief Constable of Bedfordshire Police v Liversidge* [2002] IRLR 15 that a chief constable was not liable under the Race Relations Act 1976 for the acts of one police constable against another. The chairman also directed that a preliminary issue as to the commissioner's liability should be dealt with on the first day set aside for the full hearing.

MR COMMISSIONER HOWELL QC, dismissing an appeal by the commissioner, said that for all practical purposes the wording of the relevant sections of the Sex Discrimination Act 1975 and the Race Relations Act 1976 were similar so that there was obviously a strong argument that, so far as domestic law alone was concerned, the result in a sex discrimination case brought against a chief officer of police would have to be similar to that in *Liversidge*. Though things had inevitably moved on since the chairman made his decision, the propriety of that decision had to be judged in the light of circumstances as they stood before him at the time. It was now known that, as well as *Liversidge* and *Chief Constable of Cumbria v McGlennon* [see post, pp 1135 and 1156], another case against a chief officer of police had been set down for 17 days, the employment tribunal having refused a stay, whereas a number of other cases had been stayed pending resolution of the issue of jurisdiction. On behalf of the commissioner it was submitted that (1) the chairman had misdirected himself by taking into account the applicant's contention that the effect of Directive 76/207/EEC required the result in a sex discrimination case to be different from *Liversidge*; (2) the chairman had erred in allowing irrelevant considerations to be given undue weight in holding that the disadvantages of delay to the applicant outweighed the irrecoverable costs and inconvenience caused to the commissioner if preparation for the hearing turned out to be unnecessary; and (3) it was perverse to have ordered a preliminary hearing on the first day of the full hearing. The appeal tribunal were unable to see that any aspect of the way the chairman had decided the difficult application with which he was faced was open to challenge as a matter of law. It was also reasonable for him to reach the decision he did, and the direction that the preliminary issue should be dealt with at the start of the main hearing was not unjustified in such a way as to make his decision perverse. But, though the appeal would be dismissed, any question of whether a renewed application should be made to the tribunal chairman was not thereby precluded. Matters having moved on since the chairman's decision, there might be matters that either or both parties might wish to advance before the chairman as a reason for reconsidering, on a renewed application, the question of whether the proceedings should go ahead as listed or the form in which they should go ahead.

Comr of Police of the Metropolis v Reilly; 22 March 2002; EAT/115/02
EAT: Mr Commissioner Howell QC, Dr D Grieves and Mr W Morris

UNFAIR DISMISSAL

An employee was summarily dismissed from her employment as the resident manager of retirement properties for gross misconduct when earlier the same day her employers' estates director had formed the view that she was drunk on duty. An employment tribunal upheld a complaint of unfair dismissal by the employee on the ground that, although the director had had reasonable grounds for his belief that the employee had been drunk, that belief had not been formed after conducting a reasonable investigation and giving the employee a fair opportunity to present her case; and that a reasonable employer would have suspended the employee and warned her that she faced a formal disciplinary charge of being drunk on duty, a possible consequence of which was dismissal.

LINDSAY J, allowing an appeal by the employers and remitting the matter for rehearing, said that the "reasonable investigation" as part of the test in *British Home Stores Ltd v Burchell* [1980] ICR 303 was an investigation into the facts relating to the misconduct which was the subject of the employers' charge against the employee. One did not disprove the adequacy of the investigation by saying that the employee had not been fairly warned that she faced a disciplinary charge. The tribunal seemed to have confused factual investigation with the requirements of a fair procedure. The tribunal's approach seemed to suppose that there was only one thing any reasonable employer could properly have done in all the circumstances, namely, first to suspend, then formally to charge with a disciplinary offence, then to warn that dismissal was a possible consequence, then to hold a formal disciplinary hearing and then to act on the outcome of that hearing. But that ignored that the employers asserted that there had been gross misconduct, i e something entitling the employers to meet the conduct with a summary dismissal. Where there was something which amounted to or was genuinely believed to amount to gross misconduct, that long sequence which the tribunal saw as being reasonable did not invariably need to be followed. Moreover, and perhaps more importantly, the tribunal seemed to have shown no consciousness that what they should have been looking at was the band of reasonable responses. There were many cases where one could not say that a reasonable employer would have done only one thing and nothing else, in which a range of reasonable responses was open to the employer. It was an error of law not to inquire into whether the employers' action was within that band.

Retirement Care Group Ltd v Greener; 22 May 2002; EAT/689/00
EAT: Lindsay J (President), Dr D Grieves and Ms B Switzer

APPEAL

An employee's complaints of racial and sexual discrimination and unfair dismissal were dismissed by an employment tribunal. On her appeal to the Employment Appeal Tribunal, the appeal tribunal, at the preliminary hearing, directed the appeal to proceed on two only of the grounds in her notice of appeal.

MR COMMISSIONER HOWELL QC, dismissing the employee's appeal, said that some 12 months after the preliminary hearing and very shortly before the appeal was due to be heard, an indication was given on behalf of the employee that she was seeking to raise two further grounds of appeal. These were related to two points in the extended reasons which suggested that there might be some grounds for criticising the employer, the contention sought to be advanced being that the employment tribunal's failure to make more of them was a ground for setting their decision aside. The appeal tribunal were not, however, satisfied that a proper case had been shown for taking the exceptional course of exercising any discretion in that area that might still be open, following the order made on the preliminary hearing restricting the scope of the appeal. While the possibility of the appeal tribunal using its case management powers to allow some limited departure from the defined grounds of appeal on which an appellant had been permitted to proceed to a full hearing was not altogether ruled out, such cases were exceptional and subject, in particular, to the provisos that the point had been raised before the employment tribunal and that the appellant had explained why he had not appealed against the limiting of the grounds of appeal: *Miriki v General Council of the Bar* [2002] ICR 505, 517, para 28. Such a departure was not to be allowed where, as in the present case, there had been no explanation whatever why the additional contentions, relating to matters immediately apparent on the face of the extended reasons, could not have been raised in the notice of appeal or at the preliminary hearing or at any point before the very late stage at which it was sought to introduce them. For the need for a full, proper and acceptable explanation to support any application to the appeal tribunal for the indulgence of an exercise of discretion to admit appeals out of time, see also *United Arab Emirates v Abdelghafar* [1995] ICR 65, 70H–71B, approved by the Court of Appeal in *Aziz v Bethnal Green City Challenge Co Ltd* [2000] IRLR 111. In any event, the points sought to be added were not of substantial merit. Accordingly, the application for the appeal tribunal to exercise its discretion to extend the scope of the appeal beyond the two limited grounds directed for a full hearing was refused. The first ground of appeal for consideration related to the refusal to grant an adjournment. Employment tribunals were experienced in dealing with unrepresented parties and ensuring that they got a fair hearing of the case they were seeking to put forward, and the appeal tribunal had no doubt that there was nothing in the first ground. The appeal tribunal had reached a similar conclusion on the second ground, which questioned the way the tribunal had explained their reasons for not inferring racial discrimination by comparison with a possible comparator in the way sickness absence was treated. The appeal tribunal found no difficulty in following what the tribunal were quite clearly saying—that the two cases were materially different.

Qureshi v Camden London Borough Council; 11 June 2002; EAT/1173/00
EAT: Mr Commissioner Howell QC, Miss A Mackie and Mrs T A Marsland

COMPROMISE AGREEMENT

In 1998 an applicant employee settled her claims of sex discrimination and constructive dismissal against the hospital where she had worked on terms set out in a COT 3 agreement under which she received a sum "in full and final settlement of these proceedings and of all claims which the applicant has or may have against the respondent . . ." In 2000 she was asked by a surgeon to assist him as a technician at an operation to be performed privately at the hospital, which required her to be employed for the day by the hospital. When the hospital declined to sanction the arrangement, the applicant complained that she had been victimised because of her previous sex discrimination complaint against the hospital. An employment tribunal decided as a preliminary point that the 1998 agreement did not operate to preclude the applicant's further claim of victimisation.

JUDGE REID QC, dismissing an appeal by the hospital, said that the law as to contracts for release did not decline to allow parties to contract that all and any claims, whether known or not, should be released. The question in each case was whether, looking objectively at the compromise agreement, that was the intention of the parties, or whether in order to correspond with their intentions some restriction had to be placed on the scope of the release. If parties sought to achieve the extravagant result of releasing claims of which they had, and could have had, no knowledge, whether those claims had already come into existence or not, they had to do so in language which was absolutely clear and left no room for doubt as to what it was they were contracting for. There was no reason why as a matter of public policy a party should not contract out of some future cause of action, but it would require extremely clear words. In the present case there was nothing to indicate any intention to contract out of future claims. The expression "have or may have" was apt to cover existing claims whether known to the potential claimant or not. So far as the employee's present claim was concerned, that arose out of the alleged conduct of the hospital after the date of the agreement. That conduct was actionable, if at all, only by reason of what had occurred earlier. But, it was not the earlier actions of the hospital or anything which occurred in the course of the employee's employment or in the events leading up to the making of the agreement which gave her her claim. What gave her her claim was the alleged conduct of the hospital in refusing to allow her to act as a technician in the late summer of 2000. The true construction of the agreement did not preclude her from bringing the present proceedings.

Royal National Orthopaedic Hospital Trust v Howard; 14 August 2002; EAT/861/01
EAT: Judge Reid QC, Mr I Ezekiel and Mr G Wright

TIME LIMIT

The Registrar of the Employment Appeal Tribunal refused to extend time for respondent employers to lodge a notice of appeal against a finding of liability for unfair dismissal, in circumstances where their solicitor had faxed the notice of appeal to the appeal tribunal on the day the 42-day time limit expired without ensuring that the fax had been successfully transmitted and the fax had arrived the following day.

LINDSAY J, dismissing an appeal by the employers, said that any solicitor who left service of a notice of appeal until late on the last day needed to take special care to ensure that it had been received by the appeal tribunal by whatever means he attempted delivery. That was not done in the present case. In the circumstances, it was not some unreasonable counsel of perfection for the solicitor to have actually seen that the message had gone through, and, if it had failed to go through, to have remedied the situation. In *Camden & Islington Community Services NHS Trust v Kennedy* [1996] IRLR 381 the appeal tribunal stated that, for a solicitor to act reasonably and without fault, there had to be a system in place which enabled the solicitor to find out contemporaneously whether the conduct of business was taking a normal course and to check, at or near the time, that replies which should have been received at a given date had in fact been received. Though that was a postal, not a fax, case and was concerned with lodging an originating application, rather than a notice of appeal, the principle remained that it was important that the solicitor—especially where the case was a late service on the last day—should *contemporaneously* see that the conduct of business was taking a normal course. The traditional approach of the Employment Appeal Tribunal was to take a stringent line on late appeals, which approach, given the relatively generous period of 42 days, was not improper.

David Webster Ltd v Holohan; 26 February 2002; PA/857/01
EAT: Lindsay J, President (as in chambers)

TIME LIMIT

The Registrar of the Employment Appeal Tribunal refused a request by an appellant to extend the time for appealing against an employment tribunal's decision that he should remain a respondent to sex discrimination proceedings brought by an employee against her employers, a local authority, and against the appellant, who was a councillor.

JUDGE PETER CLARK, dismissing an appeal by the appellant from the Registrar's decision, said that the relevant domestic authorities applicable to a refusal of an extension of time for appealing were to be found in *United Arab Emirates v Abdelghafar* [1995] ICR 65, approved by the Court of Appeal in *Aziz v Bethnal Green City Challenge Co Ltd* [2000] IRLR 111. Applying those principles, there was no doubt that the Registrar had exercised her discretion correctly. Waiting for a subsequent employment tribunal decision was not a good excuse for delaying the lodging of a notice of appeal against the first decision. It was, however, submitted that the guidance in *Abdelghafar* should be read subject to the Civil Procedure Rules and the Human Rights Act 1998. Attention had been drawn to CPR r 3.9, read with the court's management powers under r 3.1(1). R 3.9 set out a check list of factors to be considered by the court in determining whether, in all the circumstances, time should or should not be extended. One of those factors was whether there was a good explanation for a party's failure to comply with any rule—which was reflected in the *Abdelghafar* principles. In *Aziz* it had been argued that the *Abdelghafar* approach ought not to be followed because it was stricter than that adopted by the Court of Appeal when considering appeals brought out of time. While the court accepted that the *Abdelghafar* approach was stricter, it held that such an approach was acceptable, bearing in mind that the appeal tribunal was a statutory body with power to regulate its own procedure. The appeal tribunal procedure was not strictly subject to the CPR. It was significant that, whereas the principles underlying the CPR were to some extent incorporated into the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2001 (see, particularly, rule 10), no such incorporation was to be found in the Employment Appeal Tribunal (Amendment) Rules 2001. In those circumstances, the advent of the CPR, even if they allowed of any different result, which was doubtful, in no way altered the approach laid down in *Abdelghafar* and *Aziz*. Reliance was then placed on article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms—the right to a fair trial and the right of access to a court. It was submitted that in some way the first instance tribunal failed expeditiously to provide reasons for its decision forming the subject of the appeal and that strict application of the time limits, subject only to extension in rare and exceptional cases, breached the applicant's article 6 rights. Both those propositions were rejected. The decision presently under appeal was delivered orally at the hearing and promulgated with extended reasons 10 days later. There was no delay. The delay on the part of the second tribunal in promulgating its decision was immaterial. Further, a strict application of the time limit for appealing did not offend article 6: see, by analogy, the unsuccessful challenge to the qualifying period for unfair dismissal claims in *Stedman v United Kingdom* (1997) 23 EHRR 168.

Driver v Preston Borough Council; 11 June 2002; PA/1090/01
EAT: Judge Peter Clark (as in chambers)

TIME LIMIT

By letter of 18 January 2001 an employee was informed that he was summarily dismissed for gross misconduct. He initiated an internal appeal which was dismissed on 13 March 2001, until which date he was paid as if he were still employed. In subsequent correspondence the employer's solicitors said "You were dismissed on 13 March 2001." The employee presented complaints of unfair dismissal and race discrimination on 4 June 2001. An employment tribunal found that the effective date of dismissal was 18 January 2001, that the complaint of unfair dismissal had not been presented in time and the tribunal did not have jurisdiction to consider it, and that the complaint of race discrimination had not been presented in time but that time would be extended time in relation to those claims connected with his dismissal.

JUDGE REID QC, allowing an appeal by the employer and dismissing a cross-appeal by the employee, said that the terms of the letter of 18 January 2001 were unequivocal. There was no contractual context which could give rise to even a hint that it did not amount to an immediate dismissal. The events after the dismissal which were more consistent with there having been only a suspension could not alter the fact that there had been a dismissal. The doctrine of estoppel had no relevance. In the case of a dismissal without notice the effective date of termination was defined by section 97(1)(b) of the Employment Rights Act 1996 as "the date on which termination takes effect". The complaint of unfair dismissal had to be presented within three months of that date under section 111. That date could not be varied by an estoppel arising from the conduct of one of the parties. It would be possible to pray in aid such matters in support of a submission that time should be extended under section 111(2)(b), but it had not be suggested in the present case that any such matter had been the cause of the application being out of time or had rendered it impracticable to make the complaint in time. Different considerations applied to the race discrimination claims. The employment tribunal's basis for considering it just and equitable to extend time for the dismissal-related discrimination claim was that there was "an element of ambiguity about his precise relationship with the company in the period to 13 March" and that the employer "was unable to specify any particular detriment to it if the period was extended". It was not clear how the supposed ambiguity in the relationship could have been a basis for extending time. It was not, however, necessary to reach a concluded view as to whether that passage indicated an error of law, because there was nothing in the originating application which identified anything that might be an act of discrimination in connection with the employee's dismissal. The employment tribunal were wrong in principle in allowing an extension of time so that an entirely unparticularised claim could be pursued. The tribunal could only properly have exercised their discretion to extend time if they could identify the matters which were to be the subject of complaint and, on the material before them, they could not do so.

Highdorn Co Ltd v Saleh; 16 August 2002; EAT/80/02
EAT: Judge Reid QC, Mr D J Jenkins and Mr A E Manners

AMENDMENT

After respondent employers had filed a notice of appearance stating that they did not intend to resist the applicant's equal pay claim, accompanied by a letter agreeing she had a claim, they applied, the day before that fixed for the hearing, to amend the notice of appearance to deny liability. The application, opposed by the applicant, was granted by a tribunal chairman by a letter which gave no reasons for his decision. A request for a review was refused.

WALL J, allowing an appeal by the applicant, said that, while there were clearly differences between an application to amend an originating application and an application to amend a notice of appearance, the principles laid down by *Selkent Bus Co Ltd v Moore* [1996] ICR 836 applied to both. For the appeal tribunal to interfere with the exercise of a chairman's discretion to permit an amendment, the chairman's decision had to fall foul of the criteria for the exercise of that discretion identified by Mummery J in *Selkent*. Under the Employment Tribunals Rules of Procedure 2001 there was no obligation on a chairman to give reasons for an interlocutory "decision" such as the one under appeal, but the consequence was that the absence of reasons made it impossible for the appeal tribunal to know what factors had influenced the chairman, how he had balanced them and what weight, if any, he had given, in particular, to the fact that the consequences of the amendment might deprive the applicant altogether of her cause of action. Many decisions to allow amendments were purely formal, uncontroversial or minor, and the system could not function if chairmen were required to give detailed reasons for every interlocutory decision, but the decision in the present case was a considered one. The chairman had quite properly asked the applicant for her response to the application, and she had replied in a full and well reasoned letter. From the applicant's perspective, the absence of reasons meant that she had no idea why she had lost. In a decision as important to the proceedings as the present, such an outcome was unsatisfactory. The employers pointed out that there was no appeal against the refusal of the chairman to review his decision for reasons set out in the refusal letter. That did not affect the issue. The appeal concerned the original exercise of the discretion. If that was wrong, the refusal to review must also be wrong. Furthermore, the review decision did not address the fundamental issue in the case, namely, that by virtue of an amendment which sought to renege on an agreement in order to avoid liability and pass it on to a transferor employer, the applicant was placed in a position whereby she might have no justifiable cause of action against either employer. Two points from *Skelkent* were directly applicable. The first was the nature of the amendment. It could not have been of a more fundamental nature, involving as it did a complete volte face, with the employers reneging on an agreement freely entered into, leaving the applicant with no alternative but to apply for the transferor to be joined and the transferor taking the point that the application was out of time. The second point was the delay in making the application to amend. No explanation was given for the employers' radical change of stance. It was fundamental to the exercise of a judicial discretion in a case such as the present that there should be good reasons advanced for its exercise and that it should only be exercised for good reason. The appeal tribunal was in no doubt that, on a proper application of the balancing exercise required by *Selkent*, the decision to permit the employers to amend the notice of appearance was plainly wrong. The injustice and hardship involved in granting the amendment was very much greater than that which would have been involved in refusing it. The chairman's decision would be set aside and the matter remitted to a different chairman to reconsider the constitution of the proceedings.

Chadwick v Bayer plc; 14 June 2002; EAT/1110/01
EAT: Wall J, Mr P A L Parker and Mr G H Wright

BIAS

Four of five similar complaints of unfair dismissal were ordered to be heard together, the other being adjourned generally. Three cases were withdrawn on the second day of the hearing. The remaining case proceeded. The widow of the applicant whose case had been adjourned later obtained the restoration of his complaint. The chairman who had presided at the effective hearing reviewed that decision, sitting alone at the pre-hearing review, rejecting a submission on behalf of the applicant's widow that he was likely to be prejudiced because of his involvement in the earlier case, held that the case did not stand any reasonable chance of succeeding and required payment of a deposit.

JUDGE LEVY QC, allowing an appeal by the applicant's widow, said that the issue on the appeal was whether the chairman had applied the wrong test in deciding whether he should hear the matter. It was common ground that the right test was that expressed by Lord Hope of Craighead in *Porter v Magill* [2002] 2 WLR 37, para 102, approving Lord Phillips of Worth Matravers MR in *In re Medicaments and Related Classes of Goods (No 2)* [2001] ICR 565, 591, para 85. It was desirable that, where a question of bias was raised, those considering the issue should ensure that they were fully familiar with the current state of the law. Looking at the position as it was when the chairman made his decision, there had been a hearing with which the chairman had been concerned in which the applicant was not a party but in which he had featured. The chairman and his colleagues had formed some views as a result of that hearing which were not necessarily known to counsel representing the present appellant and did not take into account matters in the applicant's originating application. He expressed strong views in the course of the hearing before him of the merits of the case which the appellant was bringing. Furthermore, he was asked to recuse himself because of the circumstances. The appeal tribunal was strongly of the opinion that, in the words of Lord Phillips MR in *In re Medicaments*, a fair-minded and informed observer would have concluded that there was a real possibility or a real danger that the tribunal was biased. That was sufficient to allow the appeal, though the chairman might have been right in saying that the appellant would have an uphill struggle in the employment tribunal.

Attrill (decd) v Wightlink Ltd; 4 July 2002; EAT/1003/01
EAT: Judge Levy QC, Dr D Grieves and Mrs M T Prosser

COSTS WARNING

An applicant complaining of unfair dismissal asserted that she had been employed by the respondent as the manageress of a service station since 1993. A preliminary issue was directed to be determined as to whether her relationship with the respondent was one of employer/employee and, if so, whether she had sufficient service to qualify for protection from unfair dismissal. The applicant's case was listed with three similar cases for a three-day hearing. During the first day, after hearing submissions from counsel for the respondent and from the applicant, who was in person, the tribunal indicated that the applicants faced the risk of an order for costs if they did not withdraw their claims. The applicant said that faced with the threat of substantial costs she could not go ahead, and the tribunal decision was that the application was dismissed on withdrawal by the applicant. The Employment Appeal Tribunal allowed an appeal by the applicant and remitted the case, initially for directions (Recent Points [2002] ICR Part 4).

SCOTT BAKER LJ, dismissing an appeal by the respondent, said that the appeal raised the question of whether, and if so in what circumstances, it was appropriate for an employment tribunal to point out to an applicant that failure of the claim might lead to an adverse costs order. A tribunal had to be particularly careful not to place unfair pressure on a litigant in person and should only make costs warnings such as were made in the present case where there was a real risk that an order for costs would be made against an unsuccessful applicant at the end of the hearing. The critical question was whether the risk of a costs order being made against the applicant was sufficiently high to justify the pressure placed on her. His Lordship had come to the conclusion that the pressure was disproportionate. It was difficult to see how the applicant could be said to have acted "otherwise unreasonably" in the sense envisaged by rule 12(1) of the Employment Tribunals Rules of Procedure 1993. The tribunal had ruled that it was not an abuse of process to proceed with the employment point and the tribunal was not as a matter of law bound by the decision of an employment tribunal at Liverpool in a similar case. The applicant was entitled to argue that that decision was wrong. On the continuity point she had a respectable argument that there had been continuous employment for the required two-year period. Against that background the costs warning was unfair. It left the applicant in no doubt that if she continued and lost she was at a real risk of a substantial order for costs that might be enforced against her house. She simply could not afford to take the risk. His Lordship agreed with Judge Wakefield's analysis in *Lewis v Kingston-upon-Thames Royal London Borough Council* (Recent Points [2001] ICR Part 8). The ultimate question was whether the applicant had been denied a fair hearing. The danger was that where a tribunal made or pressed a costs warning that was not justified or in a manner that was not justified an applicant would be deprived of a hearing. In the light of the high threshold that prevailed at the time under rule 12(1) of the 1993 Rules the prospect of any costs order against the applicant, let alone one that placed her house at risk, seemed remote.

SEDLEY and SIMON BROWN LJJ gave concurring judgments.

Gee v Shell UK Ltd; 24 October 2002; [2002] EWCA Civ 1479
CA: Simon Brown, Sedley and Scott Baker LJJ

LISTING

An employment tribunal chairman refused a request by an applicant to postpone or reschedule the hearing of his complaint of race discrimination made on the ground that the fact that it had been set down for eight days spread over a period of five months prejudiced a fair hearing.

LORD JOHNSTON, on an appeal by the applicant, said that it appeared that the reason for the somewhat unusual scheduling of the hearing was not pressure on the tribunal system, but to comply with requirements of the parties, particularly the respondents, as far as availability of witnesses was concerned to minimise clashing with their professional commitments. Though it was wholly inappropriate for the appeal tribunal to issue any form of instruction as to how the employment tribunal should run its own affairs and administer its listings, there were one or two observations that could be made. In the first place, the deliberate scheduling of a case whereby there were gaps between every day of a proposed hearing was unsatisfactory and to be avoided unless absolutely necessary. That was because it lent itself to the risk of a division between examination and cross-examination of a witness, which was unsatisfactory and not conducive to good case management. If the gap in time was substantial, it would appear to make it more difficult for the tribunal to compare examination in chief to cross-examination by way of recollection. But that was not to suggest that any form of intermittent hearing had to be avoided in the sense that all hearings had to be continuous. Practical difficulties would arise both in relation to the availability of witnesses and the tribunal management if that became an absolute rule. On the other hand, it was extremely important to minimise any such time gaps and certainly hearings should be scheduled in any case to allow at least two or more days of hearing at any one time even if there had to be a gap. It was not conducive to good practice to have a hearing scheduled in the way in which it had been done in the present case, however well intentioned. Equally, the appeal tribunal was not impressed with the notion that hearings had to be set to accommodate the professional or other external requirements of either witnesses or parties. An applicant was entitled to a speedy resolution of his case unhampered by the external requirements of the opposite party. The appeal would be allowed inasmuch that the case would have to be rescheduled in any event, and it was to be hoped that the appeal tribunal's observations would be put into practice.

Kumar v University of Strathclyde; 4 July 2002; EAT/3/02
EAT(Sc): Lord Johnston, Mr A J Ramsden and Miss A Martin

PRACTICE

An employment tribunal dismissed an employee's complaint of unfair dismissal at the close of the employee's case on the ground that there was no evidence of any breach of contract by the employers that could have justified the employee's resignation.

MISS RECORDER SLADE QC, allowing an appeal by the employee and remitting the complaint for rehearing, said that it was not an error of law for an employment tribunal in an appropriate case to consider of its own motion whether a respondent had a case to answer. The parties might be unrepresented and unaware of the possibility of making such a submission. The Employment Tribunals Rules of Procedure 1993 and 2001 both conferred on employment tribunals a wide discretion in the conduct of proceedings which enabled a tribunal to consider of its own motion whether there was a case for the respondent to answer. Appropriate cases would occur but rarely and should be considered in accordance with the principles to be derived from the authorities. *Ridley v GEC Machines Ltd* (1977) 13 ITR 1995 and *Coral Squash Clubs Ltd v Matthews* [1979] ICR 607 established that the threshold for determining that there was no case for a respondent to answer was a high one and referred to an approach that the tribunal should reserve the exercise of its discretion to dismiss a case without hearing from the other party for exceptional cases which were "obviously hopeless" or where the party on whom the onus of proof lay had clearly failed in law or in fact to establish what he had set out to establish. In so far as those authorities indicated a different approach from that in *Elwick v Kingston Upon Hull County Council* (unreported) 18 October 1994, the appeal tribunal preferred the approach in the earlier cases. It was unlikely, having regard to comments in its decision, that the employment tribunal had applied the high threshold referred to in the guidance to the exercise of the discretion to dismiss a case at "half time" set out in *Ridley* and *Coral Squash Clubs*. The tribunal, in deciding to dismiss the claim on the basis that the employee had failed to establish that he had been dismissed, had erred in law in failing to consider the effect of the acceptance by the employers, stated in their notice of appearance, that the employee had been dismissed by them on 19 April 2000. It was significant that the findings of fact made by the tribunal stopped at 17 April and did not include the dismissal letter of 19 April or refer to the disciplinary hearing of the same date. An admission of dismissal in the notice of appearance, at the very least, called for an explanation from the employers, and the tribunal had erred in law in deciding the case without hearing their case. A respondent could choose not to call evidence. If that occurred, a tribunal could draw inferences from the material before it, which in the present case included the minutes of the disciplinary hearing, the dismissal letter and the notice of appearance.

Leach v Flexiprint Ltd; 17 September 2002; EAT/163/01
EAT: Miss Recorder Slade QC, Mr B Gibbs and Ms H Pritcher

AMENDMENT

In his originating application complaining of disability discrimination, an applicant stated: "Despite having had a heart attack and with ongoing heart disease, so having a disability under the Disability Discrimination Act, my employment was terminated without having regard to and contrary to the provisions of the Disability Discrimination Act." Seven months later the employment tribunal allowed the applicant to amend the originating application to complain that he had been unfairly dismissed, holding that it was clear from the originating application that the applicant was claiming that he had been dismissed without good reason and that, therefore, there was a causative link between the originating application, the brief facts stated, and a claim for unfair dismissal.

MR RECORDER LANGSTAFF QC, dismissing an appeal by the respondent employer, said that under the Rules of Procedure then applicable the tribunal had a discretion to permit an amendment without there being an express requirement that any claim sought to be introduced by amendment had to comply with the time limits which would otherwise be applicable if it were brought by way of a separate originating application. The employer submitted, first, that the amendment was not simply a matter of re-labelling the application; it was a completely new claim, and the tribunal had not directed itself specifically by reference to section 111 of the Employment Rights Act 1996, which provided for the time limit applicable to claims of unfair dismissal. It was argued that *Harvey v Port of Tilbury (London) Ltd* [1999] ICR 1030 demonstrated that the essential matter for the tribunal to consider on an application to amend was the time limit that would otherwise be applicable had there been a free-standing application. In *British Newspaper Printing Corpn (North) Ltd v Kelly* [1989] IRLR 222, where it was sought to amend a complaint of redundancy to add unfair dismissal, the Court of Appeal indicated that the tribunal should have asked what relevant hardships would be suffered by the parties if the amendment was, or was not, allowed. The appeal tribunal was bound by that decision and had to reject the submission that the only consideration to which the tribunal should have had regard was the question of the time limits, though they would almost always be an important consideration. The employer urged that the tribunal could not simply identify from the fact of the words "my employment was terminated" that the applicant was complaining about unfair dismissal, still less when he had identified the reason for dismissal as being because of his disability. The test was not whether the appeal tribunal would have regarded the originating application as making a claim of dismissal and of the essential unfairness of that dismissal, but whether the employment tribunal had been entitled to take that view. Taking that approach, although the tribunal might have been benevolent towards the applicant, it had been entitled to regard the words in the originating application as essentially conveying a complaint about dismissal. Where facts were sufficiently identified in an originating application, from which a consequence in terms of compensation might flow if the appropriate legal label was attached, it might be appropriate to focus less on delay and more on potential injustice than if there were little connection between the facts outlined in the originating application and the cause of complaint identified under statute. But the tribunal did have regard to the delay, and the appeal tribunal could not interfere with its exercise of discretion.

Swiss Re Life and Health Ltd v Kay; 11 July 2002; EAT/680/01
EAT: Mr Recorder Langstaff QC, Mr D J Jenkins and Mr P D Wickens

BANKRUPTCY

Following a letter from the trustee in bankruptcy of an applicant who had made a complaint of unfair dismissal saying that he did "not wish to continue the debtor's claim", an employment tribunal made an order dismissing the complaint "on withdrawal by the applicant". Thereupon the applicant wrote to the tribunal saying he wished to continue the proceedings himself, and he received a letter from the trustee saying: "This does not mean that I will stop any action" and advising the applicant to seek legal advice "If you wish to pursue the action in your own name". The matter came before a tribunal on review. The review, which the applicant arrived too late to attend, was refused and the applicant was ordered to pay £500 towards the respondent's costs.

JUDGE REID QC, dismissing an appeal by the applicant, said that it was clear from the context and the letters that the trustee in bankruptcy had not assigned back to the applicant the claim which the applicant had made and which had vested in the trustee on the applicant's bankruptcy, and there was no evidence to support the suggestion that there had at some point been an oral equitable assignment by the trustee in bankruptcy to the applicant of the right to continue the employment tribunal claim. It was then argued that the result of there being a possibility of a remedy which included a compensatory award for injury to feelings was that the cause of action did not vest in the trustee in bankruptcy under the Insolvency Act 1986 and the applicant was therefore in a position to continue his claim. That was incorrect. It might be that, so far as that part of any damages recovered reflected a personal loss in the sense of pain felt in body or mind, such as a claim for libel, the trustee in bankruptcy would not hold that part of the damages, but that did not mean that the bankrupt had a sufficient interest himself to continue the claim: *Ord v Upton* [2000] Ch 352. The applicant had had no right to carry on with the proceedings at the time of the dismissal of the claim, or the review. The second question was whether, having refused the review, the tribunal should have made an order for costs. As well as perversity, it was submitted that, once the cause of action vested in the trustee in bankruptcy, it could not be said that the applicant was a party for the purposes of rule 12 of the Employment Tribunals Rules of Procedure 1993 and that, therefore, there was no power to make an order for costs against him. But, if someone held himself out as a party and made an application asserting that he was a party, then so far as the proceedings on such an application were concerned he was a party for the purpose of having a costs order made against him. Accordingly, there was jurisdiction to make the order, and there was nothing in the making of the order which could properly be said to be an improper use of the tribunal's discretion, and the appeal in relation to the costs order of £500 would also be dismissed. Having received a warning in fairly strong terms on the preliminary hearing that he was at risk as to costs, the applicant had chosen to take that risk and it was, therefore, appropriate, given the obvious deficiencies of the appeal, that an award of costs should be made and he would be required to pay a contribution of £1,500 towards the respondent's costs.

Ellison v Petrie Tucker & Partners Ltd; 19 July 2002; EAT/795/01
EAT: Judge Reid QC, Mr P R A Jacques and Mr A E R Manners

COMPENSATION

An employment tribunal upheld an employee's complaint of unfair dismissal, which was admitted, and a claim of breach of contract and dismissed other claims. At a remedies hearing he was awarded £7,417 with interest up to the date of the decision for breach of contract and £8,745 for unfair dismissal.

LINDSAY J, dismissing appeals by the employee, said that the employee submitted, inter alia, that he had been prejudiced by details of a without prejudice offer from the employer being improperly laid before the employment tribunal. The employer's solicitors had written to the employment tribunal admitting that the dismissal was unfair and adding that negotiations had taken place at which the employer had agreed to pay £15,364 to the employee. At a subsequent directions hearing the tribunal recorded that the employer was "prepared to abide by the terms of the draft compromise agreement by a payment of the sum of £15,364". By then there was an open offer by reference to the draft agreement which the employer was entitled to bring to the tribunal's attention. If the solicitors' letter had said "We agree to pay £15,364", there could have been no possible complaint, but they had then referred back to an earlier offer which had been made without prejudice. However, the only practical effect, if any, of that would be as to costs incurred between the earlier offer and the later, and in the employment tribunal regime costs did not follow the event and the employer was never in a position to argue that it had been unreasonable of the employee not to accept its offer. The appeal tribunal failed to see how the employee suffered any relevant prejudice, and there was nothing improper in a tribunal referring in the course of a remedies decision to an open offer publicly made. Turning to the employee's claim in respect of loss of accommodation, the employment tribunal found that under the contract of employment the employer was not obliged to provide accommodation. The appeal tribunal was not convinced that section 123(3) of the Employment Rights Act 1996 enabled compensation to be paid *only* for that to which an applicant was *contractually* entitled. The expression "loss of any benefit which he might reasonably be expected to have had but for the dismissal" appeared not to be restricted to matters to which there had been a contractual requirement or in respect of which some contractual expectation existed. However, quite apart from a finding that the employee was put to no new expense, a new job, without accommodation, paid almost £9,000 pa more, and the employment tribunal decided that it was not just and equitable to compensate him for the loss.

Gould v Governors of Haileybury & Imperial Service College; 19 July 2002; EAT/635 & 1191/00
EAT: Lindsay J (President), Mr A D Tuffin and Miss D Whittingham

COMPENSATION

An employment tribunal awarded an applicant compensation for sex discrimination totalling £43,149 in respect of loss of future earnings, injury to feelings, aggravated damages and interest.

MAURICE KAY J, allowing in part an appeal by the employer, said that, in making an award of £15,000 for injury to feelings, the employment tribunal had described the treatment of the applicant as "appalling petty conduct which resulted in extreme unhappiness" and placed it as a "moderately severe case". The correct approach for the appeal tribunal was to ask whether the award was plainly wrong, or outside the permissible bracket, having regard to all the principles set out in *Prison Service v Johnson* [1997] ICR 275 and of what it knew of awards in other cases. Without making light of the injury to the applicant's feelings, the appeal tribunal had concluded that to quantify the compensation for injury to feelings at £15,000 was plainly wrong and arose from an inappropriate categorisation which had been over-emphasised as a criterion in any event. The appropriate figure was £10,000. The employment tribunal had reasoned its award of £7,500 as aggravated damages by saying: "The applicant was treated badly and her complaint resulted in a minimal letter from [the principal of the firm]. The applicant was told that she would be supplied with no reasons for the failure to gain a training contract. She was then given a letter belittling her abilities. When she took tribunal proceedings a monumental amount of effort was put into defending those proceedings. . . The defence of these proceedings was deliberately designed by the respondents to be intimidatory and cause the maximum unease and distress to the applicant." There was no doubt that aggravated damages could be a legitimate head of compensation, but it was submitted that to award aggravated damages by reference to conduct in the defence of the proceedings would be an unwarranted extension and that there were better ways of dealing with that problem, e g by an order for costs to reflect unreasonableness in the conduct of the proceedings. The problem with that approach was that it was limited to a reflection of costs unreasonably incurred and was unrelated to the victim's "proper feelings of dignity or pride" to use the words of Lord Devlin in *Rookes v Barnard* [1964] AC 1129, 1227. There was no reason in law why aggravated damages should not be awarded by reference to conduct in the defence of proceedings in a discrimination case such as the present, and there was a very good policy reason for allowing such a claim. If a respondent misconducted himself it might amount to victimisation in respect of the protected act of bringing the claim. It would be regrettable if such victimisation could only be compensated by the commencement of further proceedings. It was preferable that where there was misconduct of sufficient gravity it was compensated by the tribunal seised of the matter, which had the feel for the aggravating material and its effect on the victim. The figure of £7,500 was not appealable. It was to be observed that it was not limited to misconduct in the defence of the proceedings but included a reflection of the manner of the discrimination. It was, however, erroneous to award interest on the £7,500 for the whole period from the termination of the applicant's employment, when the misconduct in the defence of the proceedings only arose later, and, taking a broad brush approach and taking account of the reduction in the award for injury to feelings, the interest would be reduced by £502. By way of warning, litigants would be wrong to read the case as giving the green light to claims for aggravated damages in respect of alleged misconduct in the defence of proceedings. Such cases would be few and far between.

Zaiwalla & Co v Walia; 24 July 2002; EAT/827/00
EAT: Maurice Kay J, Dr D Grieves and Mr P R A Jacques

DISABILITY DISCRIMINATION

An employee, a senior benefits assessor, made a complaint that she had been discriminated against in contravention of the Disability Discrimination Act 1995 when she was issued with a final written warning by her employer because of her high level of sickness absence. She contended that to include her absence from work as a result of her disability when considering its incapability procedure for health was less favourable treatment for a reason related to her disability and that the employer should have made an adjustment by excluding that part of her absence. An employment tribunal, dismissing her complaint, found that the employer was justified in taking action in relation to a person who was absent through ill-health and that the employers' treatment of the employee was justified within section 5(1) and (2)(b), rejecting her claim that she came within the phrase in section 6(3)(f) "allowing [a person] to be absent during working hours for . . . treatment" as being a reasonable adjustment for the employer to make.

WALL J, dismissing an appeal by the employee on the preliminary hearing, said that the employee submitted that the tribunal erred in stating that her proposed adjustment was unreasonable in that it would generate ill-feeling and a potential for unauthorised absenteeism to grow and that it was for the tribunal to consider the particular circumstances of the employee's case not the matter in principle. The logical consequences of the argument that an employer should exclude from consideration the entire part of an employee's sickness absence related to disability would be that an employee could be absent throughout the working year without the employer being in a position to take any action in relation to that absence. The tribunal were correct, as a matter of good sense, to take the point that if any such absences were to fall outside the sickness policy it would generate enormous ill-feeling and be a potential for unauthorised absenteeism. In any event, it would not be a practical step for the employer to take. It would severely undermine the scope and range of the sickness procedures and would have a financial impact on the employer and disrupt its activities, in particular its ability to perform its statutory function in relation to housing benefit.

Bray v Camden London Borough Council; 23 July 2002; EAT/1162/01
EAT: Wall J, Mr D J Jenkins and Mrs R A Vickers

DISABILITY

An employment tribunal found, as a preliminary point, that a 29-year-old employee, who had made a complaint of disability discrimination against his employers, suffered from a physical impairment, namely degenerative disc disease, which was more than minor or trivial and that he was disabled for the purposes of the Disability Discrimination Act 1995. In doing so, the tribunal found that cycling, football and playing snooker, particularly for the employee's age group, were normal day-to-day activities and that the employee was unable to perform those activities.

JUDGE REID QC, allowing an appeal by the employers, said that the employment tribunal had expressed the view that, although the Guidance on matters to be taken into account in determining questions relating to the definition of disability excluded specific games and sports, considering "the overwhelming health advice continually given throughout the media, to exclude normal endeavours at fitness from normal day-to-day activities the Guidance inaccurately reflected current society". The Guidance would only be of assistance in what might be described as marginal cases. Clearly the present was such a case and the tribunal were therefore required to take into account the guidance which appeared relevant: see section 3(3) of the 1995 Act. The tribunal had expressly decided to disregard the Guidance on the basis that it did not reflect current society. In doing so, it erred in law. It was for Parliament through the Secretary of State to keep under review the appropriate boundaries of disabilities and not for individual employment tribunals to decide that the existing Guidance no longer reflected current society. Paragraph C3 of the Guidance made it clear that "playing a particular game" was not to be regarded as a normal day-to-day activity, and in its context it was clear that the Guidance was not referring to playing a game to a particularly high level. If a person suffered from such an impairment of their mobility that they were unable to engage in any "normal endeavours at fitness" then the likelihood must be that they were disabled. However, the fact that they were unable to do so by engaging in a particular sport or game did not make that sport or game a "normal day-to-day activity". Assuming as correct, for the sake of argument, that the tribunal's unlikely finding that keeping goal and playing snooker were "normal endeavours at fitness", they were none the less to be disregarded as "normal day-to-day activities" because of the terms of the Guidance. The same applied to cycling. It might be that there was material before the employment tribunal on which they could properly have found that, by reasons of the restrictions on his mobility, the employee was disabled. Unfortunately, on the findings as made in the extended reasons, it was impossible to say whether or not that was the position, and the proper course was to remit the matter to be reheard before a fresh panel.

Coca-Cola Enterprises Ltd v Shergill; 2 September 2002; EAT/3/02
EAT: Judge Reid QC, Mr J C Shrigley and Mr G H Wright

DISABILITY

At a preliminary hearing to determine whether an applicant employee was a disabled person within the meaning of section 1(1) of the Disability Discrimination Act 1995, an employment tribunal heard evidence from a medical expert, instructed jointly by both parties, who concluded that, whereas the employee had had two transient periods of depression which amounted to mental impairment, they had not had a substantial or long-term effect on his day-to-day activities. The tribunal found that during both periods of depression the employee's inability to concentrate at work, and his consequent demotion, amounted to a substantial adverse effect relating to his normal day-to-day activities, that the two episodes were to be linked by reason of section 2(2) of and Schedule 2 to the 1995 Act so as to be treated as having a long-term effect, and that he was a disabled person.

NELSON J, allowing an appeal by the employer, said that the tribunal's reference to Schedule 2 showed that it had been approaching the case on the basis that it was one of past disability. The tribunal's understanding that paragraph 5 of Schedule 2, relating to section 2(2), enabled two instances of the same problem causing a substantial adverse effect to be linked so that they could be treated as having a long-term effect was incorrect. It suggested that the tribunal had not appreciated that past disability must itself have had a substantial and long-term adverse effect. The tribunal's misunderstanding amounted to an error of law. It was not possible to know what influence that error had had on the decision as a whole but it was probable that it had prevented the tribunal from properly analysing the evidence before them. The tribunal had not, for example, examined each period of depression in order to ascertain how long it had lasted. Thus the tribunal had not explained whether by "transient" the tribunal, or the medical expert, meant that the depression was transient within each period of depression or whether it lasted throughout each period, or whether there was a constant underlying state of depression with two islands of symptoms. It was not therefore possible to know whether the first period of depression came within the definition of "long-term" or not. The decision itself did not suggest that the tribunal was intending to find that there was an underlying condition of depression with islands of symptoms; nor was there any clear medical evidence that there was such an underlying condition. Without such a finding, however, it was difficult to see how the second episode of depression could properly be said to amount to a recurrence of the earlier condition. Though it was for the tribunal to decide whether or not adverse effects were substantial, where, in accordance with his joint instructions, a doctor dealt with the issue of substantial adverse effect and found no such effect, one would expect the tribunal to comment if it was disagreeing with that opinion, unless it was unaware that it was disagreeing. The tribunal had failed properly to analyse the evidence and to explain its decision. The only appropriate course was for the matter to be reheard by a fresh panel.

HSBC Bank plc v Clarkson; 29 October 2002; EAT/205/01
EAT: Nelson J, Mr P M Smith and Mrs R A Vickers

DISCLOSURE

An employee presented an originating application complaining of unfair dismissal and race discrimination, in which he referred to an independent report commissioned by the employer to investigate, inter alia, an allegation by the employee that he had been the subject of bullying. The employment tribunal ordered disclosure of the report.

MAURICE KAY J, dismissing an appeal by the employer, said that the employer first submitted that the employment tribunal had applied the wrong test to the question of whether or not disclosure ought to be ordered and that the correct test was two-stage: first, was the document relevant? If so, second, was its disclosure necessary for the fair disposal of the case? It was said that the employment tribunal had applied a test of relevance alone and had not addressed the further crucial test of necessity. That was not correct. It was clear that the employment tribunal had been convinced that a fair hearing (which was synonymous with the fair disposal of the case) required that the relevant material in the report be disclosed. Although the word "necessary" was not used, the language used was equivalent to the test as the employer had identified it. The second ground of appeal was essentially a perversity argument. The decision to order disclosure had been taken in the light of an appraisal of the contents of the report, which the tribunal had read with the consent of both parties. The employer acknowledged that it was impossible for the appeal tribunal to say that the employment tribunal's assessment of the report was in itself perverse, as the appeal tribunal had not seen the report. That caused the employer to submit that no reasonable tribunal could have ordered disclosure, and that submission was rejected. The third ground of appeal was that the employment tribunal decision included express references to a number of authorities which had not been cited or referred to in the course of the hearing. The propositions included in the decision and based on the authorities were self-evident and incontrovertible. Moreover, the reason for the decision to order disclosure was not to be found in one or more of those propositions but in a different passage. The issue was whether the correct test was applied. In the judgment of the appeal tribunal, the test that was applied was entirely consonant and consistent with the correct test. There was no error in the reference to the authorities. A further point raised by the employer concerned the tribunal's comment that it was "not possible to understand accurately the recommendations and planned actions without reading the findings which gave rise to them" which raised the question as to whether, following its reading of the report, the employment tribunal ought to have invited further submissions on that subject. The answer had to be in the negative. Moreover, only one side would have been in a position to make such submissions as the employee's counsel had not seen the document. It had been suggested that the appeal tribunal might like to give some general guidance, but the circumstances of the present case were highly specific.

Hackney London Borough Council v Joseph; 4 July 2002; EAT/1260/01
EAT: Maurice Kay J, Mr D J Jenkins and Mrs J M Matthias

STRIKING OUT

An applicant's originating application made complaints of sex and race discrimination and breach of contract against both his employers and the employment agency who had placed him with the employers. The applicant, who was from New Zealand, alleged, inter alia, that when he complained to the agency of sexual harassment by his supervisor he was told that as a "traveller" many people in his position had to put up with worse and he should be grateful. The employers wrote to the employment tribunal seeking to strike out the originating application under rule 13(2)(e) of the Employment Tribunals Rules of Procedure 1993 on the ground that the conduct of the proceedings had been scandalous, frivolous or vexatious, citing abusive phone calls from the applicant's fiancee and alleging a vendetta to secure maximum publicity and compensation. The applicant had received no notice of that application when he attended a hearing for "case management" directions which commenced with an application by both respondents to strike out and the production of a 200-page bundle. The chairman granted the application, stating, inaccurately, that the applicant had been forewarned. She found that the race claim had "no potential for success", since "traveller" was not seen as referring to a person from New Zealand and that the only purpose in bringing the case appeared to be vexatious, and, accepting the employers' evidence as to the abusive telephone calls, she found that the proceedings had been conducted in a vexatious and scandalous way.

MRS RECORDER COX QC, allowing an appeal by the applicant, said that it was clear that the applicant had not had any notice that the strike-out application was going to be made. The chairman had sought to rely on rule 13(3) on the basis that a tribunal was not required to give written notice if the party was given an opportunity to show cause orally why the order should not be made. No reference, however, to that rule appeared in her decision, because she had proceeded, erroneously, on the basis that the applicant had been forewarned. In any event, reliance on rule 13(3) was not appropriate where the grounds of the application concerned conduct occurring some time before the application was heard, or occurring over a period of time. In such circumstances it was important to ensure that a party called on to answer accusations about such conduct had proper notice and was able properly to prepare to defend himself. The opportunity to show cause orally had to be an adequate opportunity. The applicant could not be said to have had an adequate chance to respond to the application, even allowing for the facts that many of the documents in the bundle had already been disclosed and that the chairman had allowed the applicant's representative 25 minutes before requiring him to respond. In addition, the chairman had erred in having regard to matters on the tribunal file relating to a dispute between the applicant and the tribunal staff. Accordingly, there had been an improper exercise of the chairman's discretion to proceed to hear the application. Turning to the striking out of the racial discrimination claim under rule 13(2)(d), in *Care First Partnership Ltd v Roffey* [2001] ICR 87 the Court of Appeal held that an employment tribunal had had no jurisdiction under the 1993 Rules to strike out the applicants' claims at the start of the hearing on the ground that they stood no reasonable prospect of success. In *Balamoody v United Kingdom Central Council for Nursing, Midwifery and Health Visiting* [2002] ICR 646 the Court of Appeal distinguished cases where there was no reasonable prospect of success from those which were on any footing bound to fail, which could properly be said to be "frivolous" or "vexatious" such as to found jurisdiction to strike out under rule 13(2)(d). The respondents submitted that the racial discrimination complaint was a claim which could properly be said to have no chance whatever of success and was therefore properly struck out. The appeal tribunal did not accept that. The chairman had dealt with the word "traveller" as bearing only one meaning, namely gipsy. The meaning relied on by the applicant related to Australasian migrant workers and was, he maintained, often used to describe workers like himself, working here on temporary jobs. The precise words used and their meaning were matters of evidence to be considered at the hearing. As emphasised in *Anyanwu v South Bank Student Union* [2001] ICR 391, discrimination cases should not be struck out save in the plainest and most obvious cases.

Catton v Hudson Shribman; 10 October 2002; EAT/111/01
EAT: Mrs Recorder Cox QC, Ms N Amin and Mr D Chadwick

STRIKING OUT

An employment tribunal ordered an applicant's claims of race and sex discrimination against her employers to be struck out under rule 13(2)(e) of the Employment Tribunals Rules of Procedure 1993 on the ground that the applicant's solicitor's failure to comply with directions for the hearing of preliminary issues amounted to scandalous conduct of the proceedings.

MR RECORDER BURKE QC, allowing an unopposed appeal by the applicant, said that the applicant's solicitor had plainly failed in his duty to ensure that the directions were complied with. It was not sufficient for a solicitor, even a sole practitioner, to say that he had not had enough time to do the work. Though the appeal tribunal would hesitate long before interfering with the exercise by an employment tribunal of its discretion, even apart from making a number of important errors, the employment tribunal had failed to approach its consideration of whether to exercise the power to strike out under rule 13(2)(e) correctly in law. The starting point had to be whether the conduct of the applicant's case had been scandalous. In *Bennett v Southwark London Borough Council* [2002] ICR 881 the Court of Appeal had addressed precisely that topic and concluded, at para 27, that "scandalous" did not, in the modern world, mean shocking but embraced "two somewhat narrower meanings: one is the misuse of the privilege of legal process in order to vilify others; the other is giving gratuitous insult to the court in the course of such process". That was a direct and binding exposition of the contemporary meaning of "scandalous". Had the tribunal had the judgments in *Bennett* in front of them, they would necessarily have come to a different conclusion as to whether the solicitor's conduct was scandalous within the correct meaning of that word in rule 13(2)(e). The conduct of the applicant's solicitor, however disappointing and open to strong criticism, did not amount to a misuse of the legal process in order to vilify others and did not amount to gratuitous insult to the court, and the tribunal was wrong in law to conclude that it was scandalous. Furthermore, the tribunal appeared to have proceeded on the basis that the solicitor's conduct was such that it should strike out by reason of that conduct without consideration of any other matters. Before a tribunal could, as a matter of law, strike out on the basis that there had been scandalous conduct under rule 13(2)(e), or under its replacement in the 2001 Rules, it had to consider, in addition to the degree of the shortcomings under scrutiny, whether a fair trial of the issues was nevertheless possible: *De Keyser v Wilson* [2001] IRLR 324, para 24. In the current context it was essential for a tribunal which was considering a strike-out on the basis of scandalous conduct to consider whether, despite that conduct, a fair trial could nevertheless be achieved and to balance any risk that a fair trial could not be achieved against the seriousness of the conduct under examination. If the tribunal had asked itself that question there could only have been one answer, namely that a fair trial was possible. Further, *Bennett* also decided that, before striking out in the face of scandalous conduct, a tribunal had to consider whether striking out was a proportionate response to the conduct. Though it was possible that that part of the decision in *Bennett* was obiter, it appeared to be plainly right, and the tribunal in the present case had not considered proportionality at all.

Ogunleye v Greater Manchester Probation Committee; 2 September 2002; EAT/817/01
EAT: Mr Recorder Burke QC, Ms K Bilgan and Mrs A Gallico

EMPLOYMENT TRIBUNAL

By a majority decision, an employment tribunal dismissed an employee's claim of indirect sex discrimination on the ground that the employers' refusal to allow her to return to part-time working after the birth of her child was justified within the meaning of section 1(1)(b)(ii) of the Sex Discrimination Act 1975.

JUDGE PETER CLARK, allowing an appeal by the employee, said that the correct approach to the question of justification for the purposes of section 1(1)(b)(ii) was set out in *University of Manchester v Jones* [1993] ICR 474, 497–498, and *Allonby v Accrington and Rossendale College* [2001] ICR 1189, 1201, para 29. The employment tribunal's reasons did not demonstrate that it had adopted that approach. First, there was nothing to indicate that the tribunal had considered the quantitative and qualitative effect of the requirement for full-time legal secretaries in the employers' personal injuries department on women affected by it. That was a pre-requisite for the necessary balancing exercise, taking into account also the needs of the employers which were, by contrast, fully set out in the tribunal's reasons. Secondly, no attempt was made to explain how the minority member reached his or her dissenting opinion. The appeal tribunal would adopt the words of Phillips J in *Parkers Bakeries Ltd v Palmer* [1977] IRLR 215, para 11: "where there is a majority decision it is very desirable that the views of the majority and those of the minority should be set out clearly and distinctly in separate paragraphs. Unless that is done neither the parties nor the appeal tribunal can really get a clear idea of precisely what are the views of the majority and minority respectively." *Palmer* was a comparatively straightforward unfair dismissal case. The desirability of the majority and minority views being clearly and fully expressed in the tribunal's reasons was, if anything, greater in a case such as the present where the tribunal was required to carry out a careful balancing exercise between the extent of the detriment to employees on the one hand and the needs of the employers' business on the other. The decision would be set aside and the whole case remitted to a fresh tribunal for rehearing.

Fox v Betesh Fox & Co Solicitors; 7 October 2002; EAT/363/01
EAT: Judge Peter Clark, Ms G Mills and Mr J C Shrigley

EMPLOYMENT TRIBUNAL

After an eight-day hearing an employment tribunal dismissed an employee's complaints of, inter alia, race discrimination and unfair dismissal.

JUDGE SEROTA QC, dismissing an appeal by the employee made on the ground, inter alia, that he had been denied a fair hearing because the tribunal chairman had repeatedly fallen asleep during the course of the hearing, said that the employee had made nine specific allegations before the employment tribunal which, with the exception of one, had been set out in the extended reasons, investigated and rejected on the facts. There was no evidence to justify the suggestion that the employment tribunal had misconstrued the evidence. It had correctly directed itself and made findings which could not be disturbed on appeal. The applicant had suggested that the chairman was asleep during some of the evidence of one witness, but it was apparent that the chairman had made a note of that evidence. The employee's representative said that he had been embarrassed to raise the question of the chairman dozing off as he was unwilling to prejudice his client's case by upsetting the chairman, and he sought to distinguish *Red Bank Manufacturing Co Ltd v Meadows* [1992] ICR 204 on the grounds that the conduct there was that of a lay member, not the chairman, and that the member had been questioned at the time and given an explanation. However, those matters formed no distinction at all. It was quite wrong, if the employee was correct, that the chairman's conduct should have extended throughout the eight days of the hearing without any complaint being made to the tribunal. A litigant could not be permitted to allow conduct such as that alleged to continue on the basis that, if the decision was in his favour, he would take no action, but that there was a ground of appeal if the decision should go against him. If an advocate in an employment tribunal considered a member of the tribunal was dozing or failing to attend, he had a duty to draw that to the attention of other advocates and to raise it with the chairman at once. The duty of an advocate to a client, and to the tribunal, had to prevail over any personal embarrassment. If the conduct complained of was seen by both advocates, the question of embarrassment should not arise. If the matter was raised at the time it could be dealt with appropriately by the tribunal, and, if there was substance in the complaint, the employment tribunal might have to order a rehearing. Unless matters such as were complained of in the present case were raised at the time, as Tucker J made clear in *Red Bank Manufacturing Co Ltd v Meadows*, they would not be entertained by the appeal tribunal.

Mayers v Corporation of London; 10 December 2002; EAT/812/00
EAT: Judge Serota QC, Miss C Holroyd and Mr A D Tuffin

EQUAL PAY

Women hostel workers employed by a city council applied for equality of pay with three male workers employed by the council at another hostel. An employment tribunal directed that a material factor defence under section 1(3) of the Equal Pay Act 1970, raised by the council, should be taken as a preliminary issue, and that issue was determined against the council.

JUDGE PETER CLARK, allowing an appeal by the council, said that on the face of section 1(3) the material factor defence differed depending on whether the claim for equal pay was based on like work or work of equal value. In the former case (section 1(3)(a)) there *had to be* a material difference between the woman's case and the man's. In the latter (section 1(3)(b)) there *might be* a material difference. It followed that a necessary pre-condition to determining whether the section 1(3) defence was made out was to decide whether the applicant's case was properly based on like work or work of equal value. The present case provided an example of a point which ought not to have been taken as a preliminary issue. The appeal tribunal would proceed on the assumption that the case was a like work case, since below the council had accepted that the relevant test was that adumbrated in *Glasgow City Council v Marshall* [2000] ICR 196, applying *Strathclyde Regional Council v Wallace* [1998] ICR 205, which were both like work cases. Applying the guidance in those cases, the test for an employer seeking to establish the section 1(3)(a) defence was: (1) was the employer's explanation or reason for the difference in pay genuine and not a sham? (2) Was the less favourable treatment of the applicant due to that reason? The factor had to be significant and relevant. (3) The reason must not be the difference of sex. (4) In a like work case the factor relied on had to be a significant and relevant difference between the woman's case and the man's case. The employment tribunal had answered the first three questions adverse to the council and made no finding on the fourth question. In relation to the first question, the appeal tribunal had carefully considered the tribunal's reasons but were unable to discern what it was about the council's reasons, good bad or indifferent, that was said to be other than genuine. The second question raised an issue of causation. Justification was irrelevant at that stage, and the tribunal had fallen into error in considering the question of justification at the causation stage. On the third question, it was for the tribunal to determine whether in fact a disproportionate impact on women amounting to prima facie indirect sex discrimination was present in the difference in treatment and, if so, to determine whether the council had justified the less favourable treatment; alternatively, whether the less favourable treatment was directly discriminatory, in which case the question of justification also arose in the context of equal pay. Neither question had been addressed by the tribunal. Accordingly, the tribunal's reasoning that the material factor defence had not been made out could not stand.

Carlisle City Council v Bulman; 2 December 2002; EAT/1120/01
EAT: Judge Peter Clark, Mr P A L Parker and Mr S M Springer

ESTOPPEL

A local authority employee was summarily dismissed for gross misconduct following the application of a new disciplinary procedure. Under the old procedure he would have been entitled to a hearing by councillors; and, on a complaint of unfair dismissal by the employee, an employment tribunal found that the council had had no right to impose the new procedure, that failure to provide a hearing by councillors would be a fundamental defect which might well have affected the result, but that the employee was estopped from relying on the old procedure. The tribunal found that the dismissal was fair and dismissed the complaint.

JUDGE PETER CLARK, allowing an appeal by the employee, said that for the equitable doctrine of estoppel to operate there had to be a legal relationship giving rise to rights and duties between the parties; a promise or a representation by one party that he would not enforce against the other his strict legal rights arising out of the relationship; an intention on the part of the former that the latter would rely on the representation; and such reliance by the latter party. In the present case the necessary legal relationship existed. Had the employee promised or represented that he would not enforce his strict legal rights against the council in the form of the old procedure, it being common ground that he had not agreed to the new procedure, intending the council to rely on that representation? The representation did not need to be express but it had to be clear and unequivocal. Further, it had in some way to have influenced the conduct of the council. It was not correct to say, on the undisputed evidence, as did the tribunal in their reasons, that at no point had the employee's advisers challenged the application of the new procedure. Although their challenges had not been directed specifically at the procedure as a matter of contract, it was absolutely clear that the employee was not silent on the matter and had protested. The tribunal had erred in so far as they implicitly found that the employee had made a clear and unequivocal representation to the council that he would not seek to rely on his contractual right to the old procedure. Further, there was no evidence before the tribunal that the council had acted in reliance on any representation made by the employee. Accordingly, the tribunal had fallen into error in finding that the employee was estopped from relying on the old procedure, and the case would be remitted for rehearing before a different tribunal.

Lee v Bristol City Council; 30 October 2002; EAT/536/01
EAT: Judge Peter Clark, Mr C Edwards and Mrs J M Matthias

MISCONDUCT

An employee accused of bullying and intimidation was refused the opportunity to cross-examine the makers of statements against her. The employer's panel conducting the disciplinary hearing read the statements, which the employee claimed were "a pack of lies" the makers had been coerced into making. The panel adjourned the hearing and saw the witnesses, who confirmed their statements and denied that they had been coerced. The panel formed the view that the witnesses were terrified of the applicant and that she was guilty of gross misconduct. She was dismissed and her complaint of unfair dismissal was rejected by a majority of the employment tribunal.

WALL J, dismissing an appeal by the employee, said that the function of cross-examination in the forensic context of civil proceedings was to test the credibility of witnesses as part of a fair hearing in which each party's case was put to the other, with the object of the tribunal deciding, on the balance of probabilities, who was telling the truth and what, factually, occurred. Section 98 of the Employment Rights Act 1996 did not require a dismissing employer to be satisfied that the employee whose conduct was questioned had actually done what he was alleged to have done. It was sufficient for the employer to have a genuine belief that the employee had behaved in the manner alleged, to have reasonable grounds for that belief and to have conducted an investigation which was fair and proportionate to the employer's capacity and resources. The employer had to act fairly but fairness did not require a forensic or quasi-judicial investigation. To a lawyer, cross-examination designed to undermine credibility would appear the natural way of testing whether witnesses were telling the truth, but it did not follow that an employer was bound to take the same course. The question for a tribunal hearing an unfair dismissal claim was whether in all the circumstances the investigation as a whole was fair. There was no rule of law that rendered it incumbent on an employer to arrange a hearing which gave the employee the opportunity to cross-examine the person making a complaint: *Ulsterbus v Henderson* [1989] IRLR 251, para 21, though that case did not lay down that cross-examination could never be required in any investigation carried out by a reasonable employer. The question in each case was whether the employer fulfilled the test in *British Home Stores Ltd v Burchell* [1980] ICR 303, and it was for the employment tribunal to decide whether the employer had acted reasonably and whether the process had been fair. In the instant case the tribunal had directed itself appropriately within the framework of section 98(4) and the conclusions of the majority could not be challenged. It was, however, unfortunate that the employer did not give reasons for its refusal to allow the employee to cross-examine the complainants. It was also unfortunate that the disciplinary panel, when they re-interviewed the complainants, did not put to them all the matters raised by the employee at the disciplinary hearing. A different employer might have taken the view that fairness required cross-examination of the witnesses, but the procedure adopted by the employer in the instant case was within the band of reasonable options.

Santamera v Express Cargo Forwarding (t/a IEC Ltd); 26 November 2002; EAT/780/01
EAT: Wall J, Lord Davies of Coity and Mr D J Hodgkins

PRACTICE

An applicant employee's complaint of unfair dismissal was adjourned at his request for health reasons and was re-listed. Six days before the new date the applicant requested a further adjournment, claiming that he had only then heard of the re-listed hearing. The adjournment was refused, though the applicant was told that if the employment tribunal were satisfied that he had not received the notice of hearing the case would be postponed. The applicant did not attend the hearing, and the tribunal dismissed the claim under rule 9(3) of the Employment Tribunals Rules of Procedure 1993 "for his non attendance".

MS RECORDER SLADE QC, allowing an appeal by the applicant, said that rule 9(3) gave an employment tribunal a discretion to dismiss or dispose of a case in the absence of a party, but, before exercising that discretion, the tribunal had to consider the material produced by the party who was absent. That consideration was material to the exercise of the discretion and also to the decision as to what was to be done on any disposal. In the present case the tribunal had before it a claim for unfair dismissal. The dismissal was admitted and in those circumstances the burden of proof was on the respondent employer to establish the reason for dismissal and to show that it was an admissible reason. Thereafter the inquiry as to whether the dismissal was fair attracted no burden of proof on either party but was a matter to be decided by the tribunal on the evidence before it. In the judgment of the majority of the appeal tribunal, the employment tribunal did not give adequate reasons for its decision to take the course of dismissing the originating application. The reasons for so doing, such as they were, indicated that the reason for taking that course was the non appearance of the applicant. While the reasons recorded that the originating application had been considered, they gave no indication as to why, having considered the originating application and other documentation, the tribunal considered it appropriate to adopt the course of dismissing the application without disposing of it by other means such as inviting the employer to lead its evidence and make submissions. The documentation referred to by the tribunal did not provide an obvious answer as to why the application should be dismissed. The requirement in rule 9(3) for "due consideration" was a statutory pre-condition to the exercise of the discretion and, since the requirement was there in the rule, proper consideration had to be given to the documents there referred to. The case would be remitted to a different tribunal for hearing.

Roberts v Skelmersdale College; 25 September 2002; EAT/1094/01
EAT: Ms Recorder Slade QC, Mr D Smith and Mr P M Smith

[2003] ICR Part 2

COMPENSATION

An employment tribunal upheld an employee's complaint of unfair dismissal, following a failure to consult her during a reorganisation when she was made redundant, but awarded no compensation on the ground that she would have been dismissed in any event.

JUDGE McMULLEN QC, allowing an appeal by the employee and remitting the issue of remedy, said that it was clear that at the hearing and in written submissions no one had directly turned their attention to the *Polkey* process and that no opportunity was given for the employee to argue against the 100% reduction of her compensation, though the tribunal did have evidence on which it could come to a conclusion. The evidence before the tribunal included an appendix to the applicant's witness statement which set out a comparison between her past experience and her suitability for a newly created post and the employee's initial application to the employers in which she indicated her experience. The employee contended that, in the light of that evidence, it was perverse of the employment tribunal to find that it was the employers' bona fide and reasonable conclusion that the employee did not meet the relevant criteria for the new post. Since the objective standard was imported by the word "reasonable" it was possible for the appeal tribunal to examine the materials put before the employers and then before the tribunal. Given that the appeal tribunal had seen that the employee had relevant experience, it was not correct for the employment tribunal to draw the conclusion that the employers had reasonable grounds for the conclusion that she did not, and the employee's appeal was, accordingly, well founded. The real problem had occurred in the assessment thereafter based on that finding of the employee's chance of surviving in the employers' organisation. The approach taken by the tribunal, not expressly on *Polkey* but on a *Polkey* approach, had been taken without any submissions. There would be some situations where one could say that what had gone wrong was merely "procedural", and others where one could say that an employee had been deprived of something of "substantive" importance, to use the phrase of Lord Coulsfield in *King v Eaton Ltd (No 2)* [1998] IRLR 686. While in many cases it might be inappropriate to allocate the facts to either category, the distinction would often be of some practical use in considering whether it was realistic to embark on an attempt to construct the hypothesis enabling one to assess what would have happened. If the lapse was merely procedural it might be relatively straightforward to envisage the course of events, whereas it might well be more difficult if what had gone wrong was more fundamental. In *O'Dea v ISC Chemicals Ltd* [1996] ICR 222, 234–235, the Court of Appeal was critical of the distinction drawn between "substantive" and "procedural". The Court of Session in *King*, while not expressly departing from it, appeared to have adopted as helpful the distinction which it set out in para 19. The appeal tribunal would follow the later Scottish case.

Donovan v Centrepoint Soho; 17 October 2002; EAT/1172/01
EAT: Judge McMullen QC, Mr K Edmondson and Miss D Whittingham

DISCLOSURE

An employment tribunal chairman refused an application by two applicant employees for an interlocutory order for the production of documents under rule 4(5)(a) of the Employment Tribunals Rules of Procedure 2001, in relation to their unfair dismissal complaints, on the ground that the documents sought were unlikely to be relevant. The chairman refused to reconsider his decision and the employees requested extended reasons for the purpose of an appeal. Without providing reasons, a full tribunal, of its own motion, reconsidered the employees' application and, under rule 4(5)(a) and (b), required the employers to allow inspection of a number of documents.

BURTON J (President), allowing an appeal by the employers, said that there was no automatic power to review any order of a tribunal. If every order of any kind could be reviewed, employment tribunals would never be able to go forward. An order which was, in effect, a requirement under rule 4(5)(a) was not the kind of order which was the subject matter of review under rule 13. That was not to say that such an application for discovery or inspection could not be renewed, once having been refused, but the ordinary principles requiring some fresh circumstances would be required; a review was not available. In so far as the employment tribunal, in response to the request for extended reasons, had simply listed the original application once again and looked at it again, albeit with a full tribunal rather than a chairman alone, there was no power or jurisdiction to do so. The situation was, however, different so far as concerned rule 4(5)(b). There had been no previous application under rule 4(5)(b) for disclosure and inspection before the hearing. The decision under rule 4(5)(b) was one made by the tribunal of its own motion and was one for which there was, on the face of it, jurisdiction. It was submitted that the way in which the jurisdiction and power under rule 4(5)(b) should be exercised by a tribunal was by reference to rule 31 of the Civil Procedure Rules and the Practice Direction thereunder; that that required that no such order should be made without specific evidence in support; and that in the present case there was no such evidence. It appeared to the appeal tribunal that what was meant by the reference to CPR r 31 was simply to refer to the power and jurisdiction to make such orders, for example, for standard discovery and for specific discovery as described in the CPR and not to the procedures laid down in the Practice Directions which were not referred to. In any event, the power in question was a power of the tribunal to make an order of its own motion, not on the back of an application that was or could have been supported by witness statements. Nevertheless, in making an order, even of its own motion, a tribunal would want and need to pay regard, not only to the well established practice in the High Court, but also to the overriding objective set out for employment tribunals in regulation 10 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2001. It would, therefore, need to be satisfied that the documents were squarely relevant and that what was being sought was both relevant and proportionate. What had been ordered in the present case was not proportionate. Further, in the present case the order should have been not for inspection but for disclosure. However, in the ordinary case, once disclosure had been made, inspection ought to follow as a matter of course, and contested applications for inspection after an order for disclosure should be rare in the extreme and carried out at risk as to costs in respect of parties taking an inappropriate objection to inspection. It was open to the applicant to make a fresh application under rule 4(5)(b) supported by an appropriate statement and seeking much more particularised documents.

Ken Read & Son Ltd v Dawson; 11 November 2002; EAT/287/02
EAT: Burton J (President), Mr D A C Lambert and Mrs R A Vickers

MISCONDUCT

An employee who was dismissed for accessing pornography on the internet at work using the computer with which he was provided had his complaint of unfair dismissal upheld by an employment tribunal.

MISS RECORDER SLADE QC, allowing an appeal by the employer, said that the tribunal found that the employer had a genuine belief in the misconduct, that that belief was founded on reasonable grounds and that a reasonable investigation had been carried out by the employer. While it had set out the correct approach to the question of whether the dismissal was fair in all the circumstances, the tribunal had, none the less, considered for itself whether the conduct should be categorised as misconduct or gross misconduct and approached the question of the fairness of the dismissal by considering what it considered to be the proper categorisation rather than by considering whether the employer's categorisation of the conduct as gross misconduct was within the band of reasonable responses. The tribunal was faced with a claim about which the facts were not in dispute. The tribunal had found that the constituent requirements as set out in *British Home Stores Ltd v Burchell* [1980] ICR 303 were made out, and the only judgment it had to make was whether the sanction of dismissal was within the band of reasonable responses of the reasonable employer. If a correct approach had been adopted, no reasonable employment tribunal would have come to a conclusion other than that dismissal was within the band of reasonable responses of the employer.

Hillingdon London Borough Council v Thomas; 26 September 2002; EAT/1317/01
EAT: Miss Recorder Slade QC, Mr R Thomson and Mr P D Wickens

PRACTICE

An applicant and her solicitor failed to attend an interlocutory hearing before a tribunal chairman at which directions for the future conduct of her complaint of disability discrimination were given and a hearing date fixed. On receiving the directions order, the applicant's solicitor requested a review on the ground that they had not received notice of the directions hearing and that the applicant's medical expert was not available on the date fixed. The chairman refused to relist the case for further directions on the basis that the notice of hearing had been properly sent.

JUDGE PETER CLARK, allowing an appeal by the applicant, said that the critical question, never addressed by the chairman, was whether the applicant's solicitor had received notice of the directions hearing. While it was correct to say that a notice of hearing properly sent was deemed to be good service, that presumption might be rebutted where the contrary was proved by the deemed recipient. In the case of a decision (as opposed to an order) the decision would be reviewed if the outcome was proved: see *Zietsman (trading as Berkshire Orthodontics) v Stubbington* [2002] ICR 249 and the cases there cited. The same principle applied where it was sought to have an order of the tribunal, not a decision, altered, varied or revoked. The applicant's solicitor had given evidence on oath that his firm had not received the notice of hearing. Accepting that evidence, the applicant's solicitor had not attended the directions hearing because he had not received notice of it, and in his absence there was no agreement as to the hearing dates fixed by the chairman. Had he attended he would have ensured that the dates fixed were dates on which the applicant's medical expert would have been available. The error on the part of the chairman was in not inquiring into the applicant's representative's contention that he had not in fact received notice of the directions hearing.

Mackintosh v Anchor Trust; 4 December 2002; EAT/1121/02
EAT: Judge Peter Clark

STRIKING OUT

An employment tribunal ordered an employee's originating application, complaining of unfair dismissal and race discrimination, to be struck out under rule 13(2)(e) of the Employment Tribunals Rules of Procedure 1993 on the ground that the manner in which the proceedings had been conducted on her behalf had been scandalous, frivolous or vexatious following, inter alia, interventions by her lay representative when the employee was being cross-examined.

WALL J, dismissing an appeal by the employee, said that the absolute right to be represented by the individual of their choice was one of the well established rights which applicants enjoyed as part of their wider right to free access to employment tribunals. In *Bache v Essex County Council* [2000] ICR 313, the Court of Appeal clearly enunciated the rule that the right to a representative of choice was an unqualified right and was not therefore affected by regulations designed to ensure that the tribunal had power to control its own proceedings. Where an applicant before the tribunal was represented by a person who did not belong to any professional body and that person misbehaved, the tribunal's powers in relation to the individual concerned were limited. There was no professional sanction that could be invoked. There was no body to whom the offending representative could be reported. The applicant had an absolute right to be represented by the person concerned. Regrettably, therefore, if repeated warnings about the manner in which the proceedings were being conducted had no effect, the only sanction the tribunal had was the ultimate one of striking out the applicant's claim. A tribunal's reluctance to take that course was self evidently understandable. It meant that the case was not heard on its merits. The applicant might have an arguable case which was entirely obscured, and its presentation frustrated, by the manner in which it was conducted by the applicant's representative. It was for that reason that an originating application should only be struck out, under what was now rule 15(2)(d) of the Employment Tribunals Rules of Procedure 2001, if the manner in which the proceedings were being conducted on the applicant's behalf made it impossible for the tribunal to do justice between the parties. The employment tribunal had not had the advantage of the guidance given by *Bennett v Southwark London Borough Council* [2002] ICR 881, which had not been heard by the Court of Appeal until a year later, but its approach had been entirely consistent with the judgment of Sedley LJ at p 891, paras 26–29. The tribunal had been right to allow the employee an opportunity to dispense with the services of her representative. She had declined to do so. She must have been aware of the consequences of her action. The appeal tribunal were in no doubt that the employment tribunal was entitled to come to the view that the behaviour of the applicant's representative had rendered a fair assessment of the employee and her case impossible. The strike out was a regrettable but entirely proportionate response.

Edmondson v BMI Healthcare; 26 November 2002; EAT/654/01
EAT: Wall J, Mrs J M Matthias and Mrs M T Prosser

TIME LIMIT

The Registrar of the Employment Appeal Tribunal refused an application by an applicant for an extension of time for appealing against a decision of an employment tribunal dismissing his complaint of unfair dismissal, where his notice of appeal had arrived from counsel by fax at the appeal tribunal just over one hour after midnight on the last day for entering it.

JUDGE PETER CLARK, dismissing an appeal by the applicant, said that in *Abdelghafar v United Arab Emirates* [1995] ICR 65, 69E, it was said that an appeal against the Registrar's refusal to extend time was conducted as a rehearing of the original application. In CPR r 52.11 the approach to be adopted in the civil courts was to conduct appeals by way of review rather than a rehearing. The applicant submitted that there was no warrant for extending that rule to the present statutory tribunal. The employer, while content to adopt the view that a review was appropriate, had been careful to invite the appeal tribunal, in the alternative, to exercise its own discretion in accordance with the practice in *Abdelghafar*. Treating the matter as a review, the Registrar's exercise of discretion had not been shown to be wrong in law. More particularly, considering the arguments on the merits de novo would produce the same conclusion as the Registrar. While the degree of delay in lodging an appeal was a relevant factor, it was far from determinative. It was not an acceptable reason for delay that the applicant did not receive the extended reasons until five weeks as opposed to six weeks before the time for appealing expired. The point was taken that there was delay in the applicant's legal insurer's taxation specialist releasing the papers. It was essential that the applicant's solicitor, if she was not to draft and lodge a notice of appeal herself, should have obtained the papers from the taxation specialist and obtained authority from the insurer, at any rate, to lodge an appeal. That was all left to the last minute and counsel was not instructed until two working days before expiry of the limitation period. The cases had long counselled appellants and their advisers not to wait until the last moment in case there was some delay, normally in the context of postal delays, but there could be added the possibility of delays in getting through with a facsimile transmission. The applicant referred to the merits of the appeal. It was not a hopeless appeal, which would be a relevant factor in favour of the respondent employer; but nor did the grounds of appeal raise a strong unanswerable appeal. In those circumstances, as the Registrar (no doubt taking into account the guidance in *Abdelghafar*) concluded, the merits were of little significance in the overall picture. A further matter was that a member of the appeal tribunal staff had indicated that applications for an extension of time should be made with the notice of appeal: see the amended rule 37(4) of the Employment Appeal Tribunal Rules 1993. That amendment did not appear, of itself, to overrule the guidance in *Abdelghafar*, at p 71F. Whether or not an application for an extension of time could be made and granted before the expiry of the limitation period for appealing, it seemed on the facts of the present case that the application was all of a piece with the last minute approach by the applicant's advisers. Had an application been made earlier and not dealt with, the point might have had some force, but made, as it was, the day before time expired did not materially alter the overall conclusion that no good excuse had been made out for an extension of time.

Stratford v West Lancashire District Council; 18 October 2002; PA/276/02
EAT: Judge Peter Clark (as in chambers)

APPEAL

On an appeal by an employer from an employment tribunal decision upholding claims by an employee for pay in lieu of notice and holiday pay, the employer sought to raise for the first time that the claims were out of time.

JUDGE ALTMAN, allowing the appeal, said that it was never argued before the employment tribunal, and that tribunal had not considered, whether the claims were out of time and, if so, whether it was reasonably practicable for them to have been made in time and, if not, what the reasonable period would be. There was a very well established body of judicial authority that the appeal tribunal should not entertain a point of law taken for the first time and not taken before the employment tribunal. The present case, however, concerned the exception to that principle, where what was being dealt with was an issue as to jurisdiction. The Employment Rights Act 1996 made clear that the employment tribunal did not have jurisdiction to entertain a claim unless it was brought within a specified time or, if it was not reasonably practicable, within such other time as might be considered appropriate. Accordingly, the appeal raised an issue of jurisdiction, and it was right that the point should now be taken. The employee's claims for pay in lieu of notice and holiday pay would be remitted to a fresh tribunal to determine whether they had been presented within three months of the effective date of termination of his employment and, if not, whether it had been reasonably practicable to do so.

Landon v Lill; 14 November 2002; EAT/1486/00
EAT: Judge Altman, Mr T Haywood and Mr D J Jenkins

CONSTRUCTIVE DISMISSAL

An employee resigned following the rejection of his grievance about his annual appraisal and a decision by his employer to remove him from consideration for work in Australia. He made a complaint of unfair dismissal, submitting that there had been a breach of the fundamental term relating to trust and confidence in the low appraisal, the withdrawal of the consideration of him for Australia and the failure to investigate properly his grievance relating to those two matters. Dismissing his complaint of unfair dismissal on the ground that there had been no dismissal, an employment tribunal found that the failure to consider the employee for Australia had been based on the employer's interpretation of four incidents touching on the employee's attitude, including aggressive behaviour at a meeting, and that the employer's investigation had covered all those directly involved in the incidents and was fair.

JUDGE McMULLEN QC, dismissing an appeal by the employee, said that an employee was entitled to access to a grievance procedure: see *Goold v McConnell* [1995] IRLR 516, but what was seen at the time as a radical approach by the appeal tribunal had quite limited scope. In the present case, none of the criticisms made by the appeal tribunal *Goold* applied. There was a grievance procedure, it was activated, it was prompt, it was the subject of an appeal. The criticism was of the employer's judgment as to the seriousness of the incidents and of the quality of the employer's investigation. The standard against which investigation should be judged was, in the present case at least, the band of reasonable responses. The Court of Appeal had recently reaffirmed in *J Sainsbury plc v Hitt* [2003] ICR 111 that the band of reasonable responses approach applied to the conduct of investigations as much as to other procedural and substantive aspects of a decision to dismiss for conduct. That seemed to represent a slight lowering of the standards of fairness in an investigation of a disciplinary matter. Judged against the standards of a reasonable employer, could it be said that no reasonable employment tribunal could have found that the failure to investigate every single person at the meeting constituted a breach of the standards required of a reasonable employer, such breach being of a fundamental nature entitling the employee to leave forthwith? The criticisms made by the employee of the investigation by the employer fell well below that standard. The employment tribunal had been fully alert to the employee's criticism and balanced the arguments, and it had acquitted the employer in strong terms. There was no finding critical of the employee's evidence or favourable to the employer's evidence which was not supported by reasons. The tribunal had then concluded that there was "no basis for asserting or alleging that the grievance procedure as a whole was anything other than fair, detailed and thorough". The tribunal had set out its reasoning perfectly adequately for that decision. It would be noted that, applying *J Sainsbury plc v Hitt*, that seemed to be a higher standard than was required. Nevertheless, the tribunal had accepted that the employer met that very high standard and it followed that it would have done so at the lower standard which was applicable.

Hamilton v Tandberg Television Ltd; 12 December 2002; EAT/65/02
EAT: Judge McMullen QC, Mrs R Chapman and Mr M Clancy

CONSTRUCTIVE DISMISSAL

Following allegations of, inter alia, drunkenness, made by the managers of a public house, an employee went on sick leave and invoked his employers' grievance procedure. Believing that his employers were failing to deal with his grievance properly, the employee resigned. He made complaints of unfair dismissal and breach of contract. An employment tribunal found that, though the managers' conduct amounted to a fundamental breach of the implied term of mutual trust and confidence, the employee had not resigned in response to that breach and it dismissed his unfair dismissal complaint. The employment tribunal also found that, by failing to pay him sick pay and holiday pay and by changing his pay day, the employers were in breach of the contract of employment, but it did not consider the cumulative effect of those breaches in relation to the employee's claim that he had been constructively dismissed.

JUDGE McMULLEN QC, allowing an appeal by the employee, said that it was submitted, inter alia, that the employment tribunal had erred in law in that there was no direction on the "last straw" doctrine, as enunciated by Glidewell LJ in *Lewis v Motorworld Garages Ltd* [1986] ICR 157, 169: "The breach of this implied obligation of trust and confidence may consist of a series of actions on the part of the employer which cumulatively amount to a breach of the term, though each individual incident may not do so. In particular in such a case the last action of the employer which leads to the employee leaving need not itself be a breach of contract; the question is, does the cumulative series of acts taken together amount to a breach of the implied term?" The employee further criticised the employment tribunal's decision in that it compartmentalised the claims for breaches of contract on the one hand and the dismissal claim on the other, when, in truth, they were interconnected, and he submitted that there was a failure to consider the final straw and the accumulation of grievances together. In the judgment of the appeal tribunal, the employment tribunal had made decisions about each individual aspect and considered only whether each amounted to a breach of contract. It had erred in failing to apply the more flexible approach enjoined by Glidewell LJ, which was to look at matters beyond simply breaches in order to determine whether there was a cumulation of acts, breaches or otherwise. It had also erred in deciding that, since the final event—the employee's claim to have his grievance addressed—was not a breach, there was no breach at all. The finding that the conduct of the managers invoked a breach of the term of trust and confidence was itself sufficient to find in the employee's favour that there was at least one breach of contract. Further, consistent with the tribunal's approach of segmenting its analysis of the events, it then went on to consider the other complaints made by the employee and found, in his favour, that there was a breach of contract in failing to pay him his relief pay and his sick pay, in making a unilateral change to his pay date and in failing to pay his holiday pay. It was inconsistent of the tribunal not to have included those findings within its general approach to the question of repudiation. Not only did they indicate conduct by the employer of an unacceptable nature, they were also breaches of the employment contract. When added to the other significant breach of the term of trust and confidence and the other events, categorised as less than a breach, they did constitute a series falling within the "last straw" doctrine. The appeal tribunal would substitute a decision that there was a dismissal, and, given a correct direction on the law as to all the acts and breaches of contract, the facts pointed ineluctably to a decision that the dismissal was unfair. Accordingly, the case would be remitted for a remedy hearing.

Warren v S & N Pubs and Restaurants Ltd; 29 October 2002; EAT/1376/01
EAT: Judge McMullen QC, Mr P Dawson and Mr D J Hodgkins

DISABILITY

An employment tribunal held, as a preliminary point, that an applicant employee, who had complained of disability discrimination by her employers, was not disabled within the meaning of section 1 of the Disability Discrimination Act 1995.

MS RECORDER SLADE QC, allowing an appeal by the applicant, said that the expert evidence was that the applicant suffered from depression and abused alcohol. The majority in the employment tribunal had concluded that regulation 3 of the Disability Discrimination (Meaning of Disability) Regulations 1996, which provided for the purposes of the Act that alcohol addiction was excluded as an impairment, superseded paragraph 11 of the Guidance (on matters to be taken into account in determining questions relating to the definition of disability), which provided that tribunals should not have regard to the cause of a disability, even if that cause of itself would not amount to a disability or an impairment within the meaning of the Act, such as addiction to alcohol. Both the majority and the minority in the employment tribunal had erred in considering that there might be a conflict between the Guidance and the Act or the Guidance and the Regulations. The employment tribunal had erred in its approach, in that it was not material to a decision as to whether a person was suffering from a disability within the meaning of the Act to consider how the impairment from which they were suffering was caused. What was material was to ascertain whether the disability from which they were suffering at the material time was a disability within the meaning of the Act or whether, where it was relevant, as in the present case, it was an impairment which was excluded by the Regulations from being treated as such a disability. The tribunal's reasons indicated that, in its decision-making process, the tribunal had considered that it was important to understand what had caused the impairment from which the applicant was suffering at the material time.

That betrayed an error of approach so serious that the decision could not stand. The case would be remitted for rehearing of the preliminary point.

Power v Panasonic UK Ltd; 17 September 2002; EAT/747/01
EAT: Ms Recorder Slade QC, Mr D J Hodgkins and Mrs M T Prosser

DISABILITY DISCRIMINATION

A teacher, who had been away from work for 10 months suffering from anxiety stress disorder, was dismissed for the reason that the school believed that she had no intention of returning to work. An employment tribunal, while finding that the school had so concluded because of the applicant's incapacity through illness to return to work, dismissed her complaint of disability discrimination on the ground that, since the reason for the dismissal was because the school believed she did not intend to return, the decision to dismiss the applicant did not relate to her disability but to that decision.

MR RECORDER HAND QC, allowing an appeal by the applicant, said that in *Clark v Novacold Ltd* [1999] ICR 951, 962, the Court of Appeal's concern with the correct interpretation of section 5(1)(a) of the Disability Discrimination Act 1995 focused on the phrase "that reason". The court accepted the argument that the words "that reason" referred only to the first three words of paragraph (a)—"for a reason". It would be helpful for employment tribunals to remind themselves when considering whether there had been less favourable treatment of a disabled person "for a reason which relates to the disabled person's disability" that those words were there to "specify a link between the reason for the dismissal and [the] disability". Thus understood, it became more obvious that the relationship between the reason for the dismissal and the disability did not need to be direct. To find that an employee had been dismissed because of their disability would automatically place the employer in breach of section 4(2) and section 5(1)(a) of the Act, but to conclude that the reason for dismissal was not the disability did not mean that the employee's case could be rejected without further inquiry; in such a case, it was necessary to ask whether the reason for dismissal had a relationship to the disability in the sense that it was linked to it. There was nothing to suggest that the employment tribunal had considered, in terms of an examination of the nature of the reason for the applicant's dismissal and the nature of her disability, whether there was a relationship or link between them. The belief as to the applicant's intent arose from the circumstances of her continued absence due to her anxiety stress disorder; that disorder kept her from returning to work. Thus the two had a relationship and were linked together. The tribunal's finding that the two were not related had to have proceeded from the erroneous perspective that the tribunal need not look any further than the characteristics of the reason for the dismissal. The inevitable and only answer to the question whether the reason for the applicant's dismissal related to her disability was in the affirmative, and a finding to that effect would be substituted.

Shrubsole v Governors of Wellington School; 18 February 2003; EAT/328/02
EAT: Mr Recorder Hand QC, Lord Davies of Coity and Mrs D M Palmer

IMPLIED TERM

An employment tribunal upheld an employee's complaint of unfair constructive dismissal, holding that, by making a request for him to take a drug test without any prior discussion or explanation, his employers were in breach of the implied term of trust and confidence such that the employee had been entitled to resign.

JUDGE PETER CLARK, allowing an appeal by the employers, said that the employers submitted that in formulating the relevant implied term of mutual trust and confidence the employment tribunal had omitted an element, particularly material in the present case, to be found in the formulation expressly approved by the House of Lords in *Malik v Bank of Credit and Commerce International SA* [1997] ICR 606, 609, that an employer would not without reasonable and proper cause conduct itself in a manner likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. The critical element was that the employer's conduct had to be "without reasonable and proper cause". In the present case it was arguable that the employers had reasonable and proper cause for requiring the employee to take a drug test. Whether or not they did have was a question the appeal tribunal could not resolve and which had not been raised or answered below. The employment tribunal had fallen into error in their formulation of the implied term by omitting that material element from the House of Lords' formulation. On that ground the appeal would be allowed and the matter remitted for rehearing. The employers had also submitted that the employment tribunal ought to have gone on to consider whether, if there was a dismissal, it was fair. The appeal tribunal was bound by the reasoning in *Aparu v Iceland Frozen Foods plc* [2000] ICR 341 to conclude that, having failed to pursue before the employment tribunal the alternative case that if there was a dismissal it was fair, that point could not now be raised, and, as the case was being remitted for rehearing on the constructive dismissal issue only, it would not be open to the employers to advance that alterative point at the rehearing.

Dolby Hotel Liverpool Ltd v Farley; 30 October 2002; EAT/1140/01
EAT: Judge Peter Clark, Mr D Chadwick and Mr G Mills

COSTS

On complaints by six female employees that their employers' proposal to replace flexi-time working with fixed hours was discriminatory in that a considerably smaller proportion of women than men could work full-time fixed hours because of childcare responsibilities, the employment tribunal found that the employees had failed to show that that requirement was a detriment with which they could not comply and that, even if the employees had established indirect discrimination, the employers had shown that the requirement was justifiable irrespective of sex. The tribunal further found that the employees had acted unreasonably in pursuing the proceedings and made costs orders against them.

JUDGE PUGSLEY, allowing an appeal by the employees against the award of costs, said that the insufficiency of evidence as to the employees' difficulties in complying with the new regime did not in itself give rise to the inference that it was unreasonable to bring the case. There was no clear evidence to support the tribunal's finding that the employees knew or ought to have known that they had no realistic prospect of success. It could not be said that inherently and intrinsically the case was bound to fail. The tribunal had said that one employee got closer to establishing her case than another two, who in turn got closer than the fourth employee. Could it properly be said that the application of a sliding scale was a proper exercise of discretion? Was their conduct unreasonable or not? If it was unreasonable, the costs would flow. The sliding scale applied by the tribunal was somewhat muddled and there was no clear differentiation between the costs awarded for the unreasonable conduct in bringing the case and the costs awarded due to unreasonable conduct during the case. On the facts, the employees did not breach the threshold of unreasonableness set out in *Kovacs v Queen Mary and Westfield College* [2002] ICR 919. It was not sufficient that an applicant failed to prove her case. If costs were awarded on the same basis as the tribunal had done in the present case, access to tribunals would be severely limited because of fear of costs. That would not be a proper interpretation of the statutory provisions. The present case had been properly brought, and costs had not been awarded on a proper basis. It was inappropriate to remit the case to the same tribunal and no other tribunal would be in a better position than the appeal tribunal to make a decision. In that rare circumstance the appeal tribunal would reverse the tribunal's decision that costs should be paid by the employees.

Sood v Immigration Advisory Service; 25 October 2002; EAT/153/01
EAT: Judge Pugsley, Mrs M McArthur and Mr H Singh

PAID ANNUAL LEAVE

An employment tribunal upheld a claim by a casual worker for a local authority that he was entitled to paid holiday pursuant to regulation 13(1) of the Working Time Regulations 1998, alternatively under article 7 of the Working Time Directive 93/104.

JUDGE BURKE QC, allowing an appeal by the council, said that for the purposes of the applicant's claim regulation 13 applied in its unamended form. The appeal tribunal was bound by the Court of Appeal's decision in *Gibson v East Riding of Yorkshire Council* [2000] ICR 890 to decide that article 7 of the Directive was not at the material time capable of being directly enforced by the applicant against the council. In *Voteforce Associates Ltd v Quinn* [2002] ICR 1, paras 12–15, the appeal tribunal had concluded that *R (BECTU) v Secretary of State for Trade and Industry* (Case C-173/99) [2001] ICR 1152 did not have the effect of alleviating the difficulties placed in the path of those who sought to rely directly on article 7. As in that case, the appeal tribunal was thrown back on the proper construction of regulation 13, and it was inescapable that, in order to succeed, the applicant had to bring himself within regulation 13(7) and (8). The schedule setting out the hours worked by the applicant showed that there was no single period of 13 weeks in which he had worked in each week. If and in so far as the tribunal had reached its conclusion on the basis that there was a series of contracts between the applicant and the council, arising each time he was offered and accepted work, which in each of 13 successive weeks governed their relationship, that conclusion was demonstrably in error. Alternatively, the tribunal might have concluded that there was an overarching or umbrella contract which governed their relationship. The applicant signed two documents which set out that he would be offered work as and when required and paid weekly and which made clear that there was no contractual sick pay or holiday entitlement. As the appeal tribunal had concluded in *Volteforce*, the contract referred to in regulation 13(8) had to be a contract of service or a contract for services; the contract had to be one such as to render the individual a worker as defined by regulation 2(1). Though *Hellyer Brothers Ltd v McLeod* [1987] ICR 526 was not a case in which a contract of service or a contract for services was in issue, the decision underlined the essential need for mutuality of obligation to the existence of an umbrella contract of service; and in principle it was difficult to see why the need for or importance of such mutuality should be any less in the case of an umbrella contract for services. In the judgment of the appeal tribunal, mutuality of obligation to provide and perform work was as an essential an element of a contract for services as it was of a contract of service; in the absence of such mutuality, a claim based on an umbrella contract, whether of service or for services, had to founder. Where the worker was free to choose whether to accept work if offered and could not call on any obligation on the employer to provide work, the claim to an umbrella contract had to fail. Such mutuality could not be found in the documents signed by the applicant. Accordingly, if the tribunal's decision in favour of the applicant was on the basis of an umbrella contract, it erred in law, and, on the primary facts, the tribunal should have concluded that the applicant's claim failed and it would be dismissed.

South Tyneside Metropolitan Borough Council v Toulson; 28 November 2002; EAT/1333/01
EAT: Judge Burke QC, Lord Davies of Coity and Dr D Grieves

RACE DISCRIMINATION

An employment tribunal, on a complaint of race discrimination, found that a remark, to the effect that people of black Afro-Caribbean origin "come over here and scrounge off the system and then go back", made by a fellow employee, constituted racial harassment of the applicant and made awards of compensation against the fellow employee and the employers.

JUDGE REID QC, allowing an appeal by the fellow employee and the employers, said that the words complained of should never have been used. They were not directed at the applicant but could be taken as being aimed at her parents. The employers recognised that and disciplined the employee promptly for her remarks. The tribunal had deprived the appellants of the chance of cross-examining the applicant about the effect of the words on her. There was material on which substantial cross-examination could have been mounted as to the true effect of the words on the applicant. That would only have been immaterial if the tribunal had been correct in its view that if it was proved that the words were spoken there was necessarily detriment. If treatment was race specific there was no need to show that a person of a different colour would have been treated differently. But section 4(2)(c) of the Race Relations Act 1976 did require a complainant to show that he had been subjected to detriment. In *De Souza v Automobile Association* [1986] ICR 514, 522, May LJ said: "Racially to insult a coloured employee is not enough of itself, even if that insult caused him or her distress . . . the court must find that by reason of the act . . . a reasonable worker would or might take the view that he had thereby been disadvantaged in the circumstances in which he had to work thereafter." That dictum had now to be treated with some reserve because it was clear that some levels of distress would be regarded as detriment, and in any event an environment where racist remarks were tolerated might itself be a detriment. While a single act of abuse was enough to found a complaint, it did not necessarily amount to harassment. "Harassment" involved two elements: the targeting of the person being harassed and the causing of distress to the target. In very many cases the second element would be extremely easy for the employee to establish, but that did not entitle the tribunal to assume the second element, nor, as the tribunal appeared to have done in the present case, to decide that the proof of the language created an irrebuttable presumption of detriment. There were some work environments in which (undesirable though it might be) racial abuse was given and taken in good part by members of different ethnic groups. In such cases the mere making of a racist remark could not be regarded as a detriment. In the present case there was a single remark, clearly not directed to the applicant herself. It was made by a fellow junior employee. It was not the subject of complaint until considerably later. There was evidence of the two protagonists being on very good terms in the aftermath of the incident. The tribunal had erred in law in failing to consider whether there was a detriment and in preventing the appellants from cross-examining to show that there was not. The matter would have to be remitted to a different tribunal.

Thomas v Robinson; 21 October 2002; EAT/737/01
EAT: Judge Reid QC, Mr D A C Lambert and Mr J C Shrigley

RETIRING AGE

An employee who was approaching 60 years was asked by his employer whether he wished to retire at 60, whether he wished to retire at 60, draw his lump sum and be re-employed in the same grade until he was 62 (the "maximum" retiring age for his grade) or whether he wished to continue to 62 before retiring. He chose the second option, but three days before his 60th birthday he was notified that his employer had decided not to re-employ him. On his complaint of unfair dismissal, an employment tribunal found, as a preliminary issue, that the normal retiring age for employees holding the applicant's position was 62 and he was not therefore precluded by section 109 of the Employment Rights Act 1996 from pursuing his complaint.

WALL J, allowing an appeal by the employers, said that the employment tribunal had plainly failed to follow the guidance contained in the speech of Lord Fraser of Tullybelton in *Waite v Government Communications Headquarters* [1983] ICR 653, 662–663. Lord Fraser rejected the view that the contractual age conclusively fixed the normal retirement age, but, however one looked at it, that was the finding made by the tribunal. The tribunal's use of the phrase "the contractual retiring age and therefore the normal retiring age" could only be construed as a clear misdirection in law. Had the tribunal found

60 to be the contractual retiring age, that would not necessarily have been the end of the matter. The tribunal would then have needed to examine any evidence available to rebut the presumption that the contractual retiring age was the normal retiring age for employees of the applicant's grade. In that context, statistics as to the number of employees who stayed beyond 60 would be relevant. The quality of the statistics, and how informative they were, were, of course, matters of evidence for the tribunal. It did not, however, attempt to evaluate the statistics: it merely deemed them irrelevant. Nothing in *Hughes v Department of Health and Social Security* [1985] ICR 419 derogated from Lord Fraser's speech in *Waite* and the proper approach he laid down to what was now section 109 of the Employment Rights Act 1996. The question for the tribunal was whether or not the applicant had a reasonable expectation of having a normal retirement age of 62 based on the documentation and any other admissible evidence. The fact that there had been a practice of permitting employees to remain in employment up to 62 might well be evidence in support of that reasonable expectation but it was in no sense determinative of it. However, the tribunal could only properly approach the question by deciding first what his contractual retiring age was. If it was 60, the question of reasonable expectation of a normal retiring age of 62 would then arise. If 62, the question of reasonable expectation was irrelevant. It was not permissible, as the tribunal appeared to have done, to use the concept of "reasonable expectation" as a means of ascertaining the contractual retiring age. The matter would be remitted for rehearing. As neither party submitted that there was no contractual retiring age, the issue would be whether it was the same as the normal retiring age.

Customs and Excise Comrs v Jayawardane; 2 December 2002; EAT/1092/01
EAT: Wall J, Mr A E R Manners and Mr S M Springer

UNFAIR DISMISSAL

In October 2001 employers decided to make redundant one of two field service engineers that it employed and gave the applicant notice expiring on 30 November, on which date the other engineer informed the employers that he was resigning. On the applicant's complaint of unfair dismissal, the employment tribunal found that there had been improper consultation over the selection of the applicant for redundancy and determined, pursuant to *Polkey v A E Dayton Services Ltd* [1988] ICR 142, that, had a fair procedure operated, the applicant's employment would have continued until 31 December 2001; and it awarded compensation on that basis.

JUDGE McMULLEN QC, allowing an appeal by the applicant, said that the employment tribunal's approach had been attacked on the basis of *Stacey v Babcock Power Ltd* [1986] ICR 221. It was clear that all information available to an employer at the date of termination of the employment relationship was relevant in considering the fairness of a dismissal: see *Williamson v Alcan (UK) Ltd* [1978] ICR 104, 109B–C. The employment tribunal had not been referred to the cases now relied on. Though the employers accepted that *Stacey* was relevant, they submitted that it should be distinguished. The appeal tribunal disagreed. *Stacey* was authority for the proposition that a fair dismissal might become unfair as a result of supervening events. It became unfair to carry out an otherwise genuine redundancy dismissal when either more work became available, as in *Stacey*, or the pool of people to be dismissed reduced, as in the present case. Had the tribunal applied *Stacey*, the situation as to the *Polkey* reduction would have been different. The chronology of the case indicated that the applicant would not have been dismissed had a proper procedure been carried out, since if he had been engaged for a further month until the end of December 2001, when the other engineer left, there would have been no need for the employers to have engaged someone else. The correct finding, that no dismissal would have occurred, would be substituted for the limitation of the period of compensation to one month, and the matter remitted to decide the compensation due on that basis.

Colvin v Attol Business Systems Ltd; 29 November 2002; EAT/880/02
EAT: Judge McMullen QC, Mr R N Straker and Mr G H Wright

[2003] ICR Part 5

COMPENSATION

An employee who was made an offer of promotion which was then withdrawn by her employers complained that she had been discriminated against on the ground of trade union activities. The complaint was upheld by the employment tribunal which awarded the employee compensation of £5,000 for injury to feelings.

ELIAS J, dismissing an appeal by the employers against the amount of the award, said that it was argued that the tribunal ought to have made explicit comparison with the appropriate range of awards in personal injury cases; that it had erred in treating the range of awards for damages for injured feelings in the present case as being in the same range as those in cases of race and sex discrimination; and that the award was excessive. There was no need for a tribunal expressly to seek to locate where it would place the facts of the case before it in the framework of awards for injuries in personal injury cases. The Court of Appeal in *Vento v Chief Constable of West Yorkshire* [2003] ICR 318 approved observations of Smith J in *Prison Service v Johnson* [1997] ICR 275, 283: "Awards should bear some broad general similarity to the range of awards in personal injury cases. We do not think that this should be done by reference to any particular type of personal injury award, rather to the whole range of such awards." There were no grounds for asserting that discrimination on trade union grounds would justify lower awards of compensation than for other forms of discrimination such as race or sex. In each case it was necessary to establish the loss by focusing on the particular injury suffered. If the injury in two cases was the same, it would not be just to award different levels of compensation simply because the source of the injury was different forms of discrimination. But it ought not readily to be assumed that injury to feelings inevitably flowed from each and every unlawful act of discrimination. Some persons discriminated against on trade union grounds might feel deeply hurt by that affront, particularly where union membership was an important feature of their lives; other more robust characters might consider it of little consequence and suffer little, if any, distress. Since the aim was to compensate and not to punish, the compensation to be awarded ought not to be the same in each case. In *Vento* the Court of Appeal gave guidance as to the appropriate level of awards. In the light of that guidance, the appeal tribunal had to decide whether the sum awarded was larger than appropriate for the nature of the injury sustained. Although it was on the high side, it was not so clearly erroneous as to justify intervention.

Hackney London Borough Council v Adams; 6 February 2003; EAT/1318/01
EAT: Elias J, Miss C Holroyd and Mr G H Wright

DISABILITY DISCRIMINATION

An employment tribunal dismissed a complaint by an employee that she had been dismissed for a reason relating to her disability contrary to section 4 of the Disability Discrimination Act 1995.

ELIAS J, dismissing an appeal by the employee, said that whether someone was dismissed for a reason relating to her disability was simply a question of fact. The tribunal had found that the reason for the employee's dismissal was performance and that the alleged shortcomings were in no way related to her disability. On the face of it that was a finding of fact which determined the outcome of the claim, as the tribunal held. It was submitted on behalf of the employee, however, that the tribunal had failed to make certain findings of fact which it was obliged to make before reaching its decision. It was submitted that principles enunciated in *Anya v University of Oxford* [2001] ICR 847, 859–860, paras 23, 25, in the context of race discrimination, ought to apply equally to cases of disability discrimination; that there was the same risk that an employer might seek to conceal the real basis for his actions, or, alternatively, might be unconsciously influenced by considerations in relation to the disability of the employee. While accepting that the same risks might, in certain contexts, arise and that the approach in disability cases ought to be as indicated in *Anya*, albeit that in practice there might be less risk of unconscious or unintended prejudice motivating decisions in that area, the question was: what were the material facts in respect of which findings needed to be made? *Anya's* case did not say that a tribunal had to resolve every matter of disputed fact. The present case was materially different to *Anya*. It was not a case where the manager taking the decision to dismiss could have been unconsciously influenced by the employee's absences. A person could not be influenced by a factor, whether consciously or unconsciously, if he was unaware of it. Notwithstanding that the tribunal found weaknesses in the employers' evidence, it reached the clear conclusion that the manager was telling the truth. In those circumstances, since he did not know of the factors relied on as the basis of the disability claim, he could not have been dismissing for reasons relating to disability. That was not necessarily the end of the matter in all cases, because someone who was unaware of factors which might demonstrate an improper discriminatory influence might nevertheless be influenced by discriminatory considerations. After careful consideration, it seemed to the appeal tribunal that the tribunal's decision, fairly read, indicated that the manager had come to his own independent decision. There was no evidence to suggest that he had acted on the basis of any tainted evidence; moreover, the case did not appear to have been run on that basis.

Williams v YKK (UK) Ltd; 22 November 2002; EAT/408/01
EAT: Elias J, Ms J Drake and Mr P Gammon

REDUNDANCY

An employee, one of two executive assistants employed by her employers, was selected for redundancy when the employers decided they no longer had any need for two executive assistants, at a time when the employee was absent from work suffering from severe depression and unable to contemplate returning to work. On complaints by the employee, the employment tribunal held that (1) the employee had been dismissed by reason of redundancy; (2) the dismissal was unfair; and (3) the employers had discriminated against the employee, contrary to section 4(2)(d) of the Disability Discrimination Act 1995, by dismissing her.

WALL J, dismissing an appeal by the employers, said that the employment tribunal found that the employee had been given no prior warning of impending redundancy and had been consulted only in respect of redeployment. The tribunal did not consider that proper consultation would genuinely have been fruitless and held that there was procedural unfairness in the redundancy process. Finally, the tribunal found that it was because she was absent, owing to her disability, that the employers had failed to discuss the redundancy situation with her and that no justification had been put forward for that less favourable treatment. The employers argued that, in the context of the tribunal's findings that there was a genuine redundancy situation and that the employee had been dismissed as redundant following the application of genuine selection criteria, it was inconsistent of the tribunal to find that the dismissal constituted an act of disability discrimination. On unfair dismissal, the employers submitted that it was the employee's own act, in saying, in a letter to the employers, that there were no circumstances under which she would have returned to work for the employers, that brought about the alleged "procedural unfairness". In the judgment of the appeal tribunal, there was material on which the tribunal could properly reach each of its three conclusions, and there was nothing inconsistent between the findings that the employee was dismissed by reason of redundancy and that the dismissal was both unfair and discriminatory consequent on her disability. The evidence plainly entitled the tribunal to find that the redundancy process was procedurally and substantively unfair, given the failure to consult and the presentation of what was, in effect, a fait accompli. It would not be just to permit the employers to rely on the employee's letter since it followed the fact of the employers informing her, without warning or consultation or even informing her of the selection criteria, that she was to be made redundant.

Bax Global Ltd v French; 29 November 2002; EAT/812/01
EAT: Wall J, Mr D Chadwick and Mr K Edmondson

STRIKING OUT

An order dismissing an applicant's complaint of race discrimination, following the rejection of his renewed application to adjourn the hearing, which had been listed for 10 days, was subsequently revoked by the employment tribunal. The complaint was later combined with a second complaint, and, when the applicant's renewed application to postpone the listed hearing of those complaints was rejected, he refused to proceed. The employment tribunal struck out the complaints, under rule 13(2)(e)(f) of the Employment Tribunals Rules of Procedure 1993, on the grounds of want of prosecution and that the applicant had conducted the proceedings in a manner both scandalous and frivolous.

JUDGE PETER CLARK, dismissing an appeal by the applicant, said that the appeal tribunal accepted the respondents' submission that the expression "want of prosecution" embraced conduct by a party which gave rise to the inference that he did not intend to bring the proceedings to a conclusion. It included the case of a party whose deliberate default in compliance with a peremptory order of the court or tribunal or whose conduct was an abuse of process was coupled with a substantial risk that it was not possible to have a fair trial. Surveying the course of the present litigation, the appeal tribunal had no doubt that the applicant's conduct was an abuse of process. It was designed to cause maximum vexation, inconvenience and expense to the respondents and their witnesses. The final straw had been the applicant's refusal to prosecute his case. Want of prosecution did not simply arise at the interlocutory stage of proceedings. It could also arise, and on the facts of the present case did arise, when the full hearing was reached and the applicant refused to prosecute his case. The employment tribunal had been perfectly entitled to strike out the complaints on that ground. Strictly, that disposed of the appeal, however, the appeal tribunal further found that the relevant decision could properly be upheld on the ground that the applicant's conduct was both frivolous and scandalous for the reasons given by the employment tribunal. The respondents applied for costs. Bearing in mind that the appeal had been permitted to proceed to a full hearing, one could not say that the applicant's initial stance in pursuing the appeal was unnecessary or otherwise fell within the terms of rule 34 of the Employment Appeal Tribunal Rules. However, it seemed clear that the applicant had not adopted or advanced any of the grounds on which the appeal had been permitted to proceed. In those circumstances, the appeal hearing was wholly unnecessary and the respondents were entitled to their costs.

Zalzala v Sheffield University; 29 November 2002; EAT/201/01
EAT: Judge Peter Clark, Lord Davies of Coity and Mrs D M Palmer

REINSTATEMENT

An employment tribunal made an order for the reinstatement of an applicant employee under section 114 of the Employment Rights Act 1996 following a finding of unfair dismissal. The employers failed to comply with the order and, on their appeal, the appeal tribunal remitted the case for reconsideration on the ground that the issue of contributory conduct had been raised at the hearing but not considered by the tribunal. At the remitted hearing the tribunal found that the applicant had not contributed to his dismissal; it excluded evidence of matters occurring after the date of the employers' decision not to comply with the reinstatement order, in relation to whether it was practicable to reinstate the employee, and awarded compensation which included an additional award.

JUDGE PETER CLARK, allowing an appeal by the employers, said that in its decision on the remitted hearing the tribunal stated that at the remedies hearing it had determined the issue of contribution orally but it simply had not been recorded in the written decision. A finding on contribution was an essential part of the tribunal's reasoning. That proposition was derived from the mandatory requirement in rule 12(3) of the Employment Tribunals Rules of Procedure 2001 that the tribunal "shall give reasons for its decision in a document signed by the chairman" and *Portsea Island Mutual Co-operative Society Ltd v Rees* [1980] ICR 260, 264. At the remitted hearing the tribunal had expressed its conclusions on contribution but had failed to provide any adequate reasons for that conclusion. The matter would have to be remitted for a further decision so that the employers might know why they lost on that issue. The questions for the tribunal were: was the applicant guilty of blameworthy conduct in any or all of the respects alleged? If so, did that conduct cause or contribute to the dismissal (as opposed to its fairness)? In the event of a finding of contribution, it was for the employment tribunal to assess the degree of contribution. It was submitted that the tribunal had wrongly excluded relevant and admissible evidence that went to the issue of practicability. It was clearly established (see *Port of London Authority v Payne* [1994] ICR 555, 569–570) that the remedy of reinstatement involved a two-stage process, the first stage, at the initial remedies hearing, was to look forward. The employment tribunal was required to form a provisional view as to whether reinstatement was practicable. If so, an order was made, specifying the date reinstatement was to take place. If the employer failed to reinstate, the matter returned to the tribunal for a further remedies hearing. At that stage it was open to the employer to seek to show, the burden resting firmly on him, that it was not practicable to reinstate the applicant. At that second stage the tribunal was looking back, finally determining the question of practicability on the facts which had actually occurred. The relevant date for determining the practicability or otherwise of reinstatement at the second stage was the date on which reinstatement was ordered to take place. It followed that the relevant date was not, as the tribunal found, the date on which the employers decided not to comply with the order. The statutory question was not why the employer did not fully comply with the reinstatement order (his reason) but whether it was not practicable to do so. That question had to be answered on the actual facts as they existed on the date ordered for compliance. The case would be remitted with a direction to admit the relevant excluded evidence.

Yorkshire Rider (t/a First Huddersfield) v Neckles; 20 December 2002; EAT 89/02
EAT: Judge Peter Clark, Mr M Clancy and Mr D Smith

SMALL BUSINESS EXEMPTION

An employment tribunal rejected an applicant's complaint of disability discrimination on the ground that the respondent employment agency was an employer with fewer than 15 employees for the purposes of the small business exemption in section 7 of the Disability Discrimination Act 1995 (as amended by the Disability Discrimination (Exemption for Small Employers) Order 1998).

JUDGE McMULLEN QC, allowing an appeal by the applicant, said that the respondent agency employed six persons, but had on its books a large number of people who were engaged under what were called "temporary worker" contracts. In any given week it would send to its clients between 130 and 200 temporary workers. The business suffered as a result of the loss of a major client and the applicant was chosen for dismissal. The exemption in section 7 of the 1995 Act had to be strictly construed. The applicant was entitled to a hearing of her complaint unless it was clear that her right was excluded. The employment tribunal decided that the headcount of temporary workers on the agency's books should not be included for the purposes of section 7. The tribunal had expressly based its decision on the definitions in section 230 of the Employment Rights Act 1996, but had failed to address itself to section 68 of the 1995 Act and had erred in failing to deal with the applicant's submission that the definition of "employment" was regulated for the purposes of the Disability Discrimination Act 1995 by that Act and not by the Employment Rights Act 1996. Though that would be sufficient to remit the case, the appeal tribunal would deal with the substance of the argument. The temporary worker contract contained express references to the Working Time Regulations 1998, claims for any breach of which it was accepted would be made against the agency. Accordingly, the temporary worker must be within the definition in regulation 2 of those Regulations and, on that analysis, performed personally any work or services for another party to the contract, i e the agency. The persons affected by the temporary worker contract were workers; they did work; they could not substitute another person to take their place. Though the work was done for a client of the agency, in practical terms, the contractual relationship was exclusively between the temporary worker and the agency, and the fact that the work was performed for the client did not take it outside the scope of section 68. All that was required was for there to be an obligation to do work. That was the simple answer to the legal point in issue. The employment tribunal had considered the definition of contract workers as opposed to employees within section 12, but that was not relevant to the correct meaning of section 68. The tribunal also considered the agency's degree of control over its temporary workers. Again, that matter did not arise. The correct answer was to look simply at section 68 and to make an assessment of whether or not the temporary worker contract fitted within that definition. Though the language of the contract excluded the relationship of a contract of employment as between the agency and the worker, viewed as a whole, the obligations set out in the contract corresponded to those envisaged in section 68.

Burton v Frances Higham (t/a Ace Appointments); 14 February 2003; EAT/609/02
EAT: Judge McMullen QC, Mr P R A Jacques and Mrs M McArthur

TIME LIMIT

An employment tribunal chairman ruled, at a hearing for directions of a complaint of race discrimination received by respondents on 31 May 2002, that a notice of appearance presented by the respondents on 21 June 2002 was in time under rule 3(1) of the Employment Tribunals Rules of Procedure 2001.

JUDGE McMULLEN QC, dismissing an interlocutory appeal by the applicant, said that the matter could not be clearer than in the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2001, which was the modern approach to drafting rules, so that one saw properly worked out examples by reference to the calendar. Calculation began, under regulation 2(7), the day after the relevant event. In the present case that was 1 June 2002, and, thus, 21 June 2002 was within 21 days of the service of the originating application on the respondents. Regulation 2 entirely governed the factual circumstances of the present case and there was no error in the construction adopted by the tribunal chairman. The respondents applied for costs under rule 34 of the Employment Appeal Tribunal Rules. The applicant, who was appearing in person, had a law degree and had been called to the Bar in 1998; his skeleton argument made it clear that he had thoroughly researched his arguments. It was unreasonable conduct, going beyond simply making an error of law, for a person with such a background not to have read the sole rule referred to by the chairman in giving his decision, even after sight of the respondents' skeleton argument. The point was obvious and the respondents had not been called on. The applicant submitted that his means should be considered, but the court was required to disregard them by the Court of Appeal decision in *Kovacs v Queen Mary and Westfield College* [2002] ICR 919, at least until the Employment Act 2002 was brought into effect. The Treasury Solicitor had claimed six hours' preparation and attendance at £142·50 per hour. For a solicitor in Central London, even in the public service, there seemed nothing offensive about that rate, though confirmation that that was the right figure had to be submitted; but the amount of time given to the case by the solicitor did seem excessive, as she instructed counsel. Two hours would be awarded. The suggestion that it was not proportionate to have counsel at the hearing, given that the solicitor had appeared in the employment tribunal, was rejected. It was entirely appropriate for the Lord Chancellor's Department and for a judge sued personally to wish to be represented by experienced counsel. The five hours, at the Treasury Panel rate of £100 per hour, claimed for counsel's preparation and attendance would be allowed.

Moore v Lord Chancellor's Department; 14 February 2003; EAT/64/03
EAT: Judge McMullen QC

WITNESS ORDER

An employment tribunal chairman refused applications by an applicant employee for witness orders on the grounds that the applicant had failed to state what evidence the witness was expected to give and that it appeared that he might be seeking to call the witnesses solely in order to cross-examine them. The applicant's complaint was subsequently dismissed and he appealed against both decisions. The appeal tribunal extended time for appealing against the refusal of the witness orders and permitted the appeal to proceed to a full hearing without extended reasons.

JUDGE PETER CLARK, dismissing the appeals, said that the appeal tribunal had first to satisfy itself that it had jurisdiction to hear the appeal against the refusal of the witness orders [an issue raised by the appeal tribunal at an interlocutory stage], though jurisdiction was not disputed by the respondent employer. The grant or refusal of a witness order was not an administrative act but a judicial decision properly characterised as an interlocutory order. Regulation 2(2) of the Employment Tribunals (Constitution and Procedure) Regulations 2001 defined "decision". It did not include interlocutory orders made or refused under rule 4(5) of the Employment Tribunals Rules of Procedure in Schedule 1 to the 2001 Regulations. The use of the expression "decision of, or arising in any proceedings" in section 21(1) of the Employment Tribunals Act 1996 had to include not only a decision as defined in regulation 2(2) of the 2001 Regulations but also interlocutory orders, not being decisions, themselves arising in proceedings before an employment tribunal. If there were any doubt, it was removed by rule 3 of the Employment Appeal Tribunal Rules 1993 which referred to "the decision or order of an employment tribunal". Thus, the Employment Appeal Tribunal had jurisdiction to hear appeals against interlocutory orders, not being "decisions" of the employment tribunal. The time for appealing under rule 3(3)(a) was 42 days from the date on which extended reasons for the decision or order were sent to the appellant. The difficulty was that, whereas a tribunal could be required to provide extended reasons for its decision, the same was not so in respect of orders not being decisions. In practice that mismatch was avoided by recourse to rule 39(2) of the 1993 Rules, waiving the requirement for extended reasons. That lacuna had recently been filled by paragraph 3(1) of *Practice Direction (Employment Appeal Tribunal: Procedure)* [2003] ICR 122, 124. The appeal tribunal rejected the employer's submission that, by failing at the substantive hearing to renew his earlier application for a witness order, the applicant could not now rely on any error in relation to the refusal of the witness orders to set aside the substantive decision. By not renewing his application, the applicant was not conceding the point. It had been judicially determined against him, and it would only be appropriate to renew his application if there had been a material change of circumstance. A witness order would be made to compel the attendance of a witness where the tribunal was satisfied (a) that the witness could give prima facie relevant evidence, and (b) that it was necessary to issue a witness order. Plainly the practice of paper applications for witness orders in advance of a substantive hearing was a sensible course. However, it was incumbent on the party applying for the witness order to indicate precisely what evidence he sought to adduce from the proposed witness so as to pass the test of prima facie relevance. The tribunal, or chairman, had a discretion which had to be exercised judicially. Relevant factors to be weighed in the balance might include the degree of relevance of the witness's evidence and consideration of whether, in order to extract relevant evidence, the party calling the witness would need, impermissibly, to cross-examine his own witness. The question was whether the chairman, on the material then available, failed to take into account relevant factors, or took into account irrelevant factors, or otherwise reached a conclusion which was legally perverse. The state of knowledge at the relevant stage was that both witnesses had failed to respond. In those circumstances the applicant was not putting forward what the witnesses had told him they would say in evidence, rather what he hoped and felt they would say. In those circumstances it had been open to the chairman to infer that in order to elicit their evidence it would be necessary for the applicant to put leading questions to the witnesses; in other words, to cross-examine them. The reason put forward by the chairman was both permissible and relevant. More generally, it was correct that the full reasons for the order were not set out, but, since the appeal was heard in the absence of extended reasons, the ordinary principle—that the tribunal should tell parties why they had won or lost—could not apply with full rigour.

Haydock v G D Cocker & Sons Ltd; 18 December 2002; EAT/215/02
EAT: Judge Peter Clark, Mr D J Jenkins and Mr G Lewis

UNFAIR DISMISSAL

An applicant employee spent half her time as secretary to the managing director and half as personnel officer, with two employees reporting to her on personnel matters. When one of those employees was offered a post as full-time personnel officer, after the applicant had proposed that she herself should take on a full-time personnel role, she raised a grievance, and, when she was offered a grievance meeting with a member of the board of directors subject to producing a medical report showing that she was fit to pursue a grievance, she resigned. An employment tribunal upheld the applicant's complaint of unfair dismissal, holding that there had been an initial breach of contract by the employer in fundamentally changing her job structure and status, which was compounded by the subsequent handling of her grievance, destroying the relationship of trust and confidence.

JUDGE PETER CLARK, allowing an appeal by the employer, said that the employer submitted that the employment tribunal found no term of the contract that the two employees reported to the applicant; thus, removal of those reports could not amount to a breach of the contract, let alone a fundamental breach. The appeal tribunal accepted that submission in so far as it went. However, there was a further difficulty. It was the applicant's case in part that the employer was in fundamental breach by effecting a substantial change in her status and job content. The employment tribunal made no finding of fact on that contention, saying "whatever the changes to the job content might or might not be". It followed that the decision was flawed in purporting to find a breach of a non existent term and in failing to make a clear finding as to whether the relevant contractual term, the personnel function, was breached and breached fundamentally. Further, the employment tribunal, in formulating the implied term of mutual trust and confidence, omitted reference to the qualification "without reasonable and proper cause". The employer submitted that the tribunal fell into error in concluding that it was in breach of the implied term in failing to deal properly with the applicant's grievance at the same time finding that she had not sought to pursue her grievance in accordance with the terms of her contract of employment. The employer submitted, correctly, that an employer could not be held to have breached the implied term, without reasonable and proper cause, in circumstances where the employer was seeking to apply the contractual grievance procedure and the employee was not. The employment tribunal's use of the word "compounded" was not altogether easy to follow, and the appeal tribunal were unsure as to precisely what facts the employment tribunal found amounted to a fundamental breach of the implied term. As to the fairness of any dismissal, the employer submitted that the passage from the judgment of the court given by Browne-Wilkinson LJ in *Berriman v Delabole Slate Ltd* [1985] ICR 546, 550G–551A, meant that it was for the employer to justify the conduct which the employee complained amounted to a repudiatory breach. That was not the understanding of the appeal tribunal. Section 98(1) of the Employment Rights Act 1996, the successor to section 57(1) of the Employment Protection (Consolidation) Act 1978, required the employer to show a potentially fair reason for dismissal and dismissal included constructive dismissal under section 95(1)(c). Thus it was for the employer to show a potentially fair reason for the constructive dismissal in accordance with section 98(2) or some other substantial reason (section 98(1)(b)). The employer was not required to justify the repudiatory conduct, but to show the reason for it. That led on to the difficulty in the tribunal's finding that the constructive dismissal, as found, was unfair. Nowhere from the tribunal's reasons could the appeal tribunal discern (a) the potentially fair reason for dismissal advanced by the employer and (b) the tribunal's finding as to whether that reason was established. The tribunal found that it could not be said that the employer acted reasonably within section 98(4), but that was not the statutory question. The tribunal had first to find a potentially fair reason for the dismissal. If none was advanced, the dismissal was unfair. Section 98(4) was not engaged. If a potentially fair reason was established, it was then the reasonableness of the employer's decision to dismiss for that reason which fell to be considered under section 98(4), not the conduct of the employer which led the employee to resign in a constructive dismissal case. The tribunal decision was fundamentally flawed, and the only proper course was to remit the matter to a fresh tribunal for the entire case to be reheard.

Cape Industrial Services Ltd v Ambler; 20 December 2002; EAT/950/01
EAT: Judge Peter Clark, Mr D J Hodgkins and Mr N D Willis

DISABILITY DISCRIMINATION

An employee, an apprentice bricklayer, complained, inter alia, that he had been subjected to a continuing act of disability discrimination arising from bullying by other persons working with him. The employment tribunal dismissed the complaint on the ground that the employer was not liable for disability discrimination by a contractor's operatives under section 58 of the Disability Discrimination Act 1995.

JUDGE PROPHET, allowing an appeal by the employee, said that the employment tribunal were aware of the basic nature of the contract between the contractor and the employer, ie to provide bricklaying services; and it was open to them to reach the conclusion that it could not properly be described as one which involved a contract personally to do work. It was submitted on behalf of the employee that the employment tribunal should have considered the possible application of the principles in *Burton v De Vere Hotels Ltd* [1997] ICR 1, which undoubtedly applied to race and sex discrimination, to the employee's disability discrimination complaint. The employer argued that the wording of section 5(1) of the 1995 Act did not permit the application of the *Burton* principles to that Act; that discrimination could only be found on the part of an employer under section 5(1) if "for a reason which relates to the disabled person's disability, *he* treats him less favourably . . ." The difficulty with the employer's submission was that it did not allow the disability discrimination legislation to provide any protection for someone in the present employee's position, assuming that there was harassment from the operatives that could qualify as disability discrimination. It would be an odd result if the principles in Burton could not be applied to disability discrimination simply because of the way in which the terms of the 1995 Act had been set down. The appeal tribunal favoured a purposive construction of the legislation so that so far as possible discrimination legislation moved in harmony. There was no reason why the duty place on an *employer* by section 4(2)(d) of the 1995 Act (which had the same wording as the Race Relations Act 1976 and the Sex Discrimination Act 1975 which was the basis of the *Burton* ruling) should be thwarted by the definition of discrimination in section 5(1) where the words "a reason which relates to the disabled person's disability" were usually regarded as having a wide sweep. The employee had a strong case for arguing that the "control" principles enunciated in *Burton* should apply to the employer who had contract labour. The case would be remitted for further consideration, but the employer would have leave to appeal.

Ree v Redrow Homes (Yorkshire) Ltd; 9 April 2003; EAT/35/03
EAT: Judge Prophet, Ms S R Corby and Mr G Lewis

REMEDY

An employee was dismissed for gross misconduct when his employer formed the view that he was responsible for pools of liquid, believed to be urine, on the locker room floor. An employment tribunal found that the dismissal had been unfair, in that there were doubts about the reasonableness of the employer's grounds for concluding that the employee was guilty of misconduct, the investigation was not reasonable and the decision to dismiss summarily was not a reasonable sanction; but held that, applying the rule in *Devis v Atkins* [1977] ICR 662, it was not just and equitable to award him any remedy as the employer would have had adequate grounds for dismissing the employee fairly because he had deliberately misled the employer as to the nature of his medication, holding himself out as diabetic in order to work fewer hours.

ELIAS J, allowing an appeal by the employee, said that the principal ground of appeal was that the tribunal had failed to comply with the principles of natural justice in that they did not give the employee any opportunity to deal specifically with the *Devis v Atkins* point. The employer submitted that the employee had had the opportunity to make representations and that, in any event, the present was one of those exceptional cases where there was nothing that the employee could say; that it would be fruitless to remit the matter when the case against the employee was overwhelming. The appeal tribunal could see the force of those submissions, and no doubt there were exceptional cases, but the present was not such a case. It was said on behalf of the employee that there might be additional evidence he could advance and that, moreover, it was far from clear that even if there had been deliberate deceit it would have justified dismissal. The appeal tribunal was satisfied that it would be wrong, in the circumstances, to deprive the employee of an opportunity to call such evidence as he thought might be relevant to the issue and to make submissions in relation to the point. The employment tribunal considered that the employee had had the opportunity to deal with the matter but had not taken advantage of it. The appeal tribunal did not think that that opportunity had been sufficiently unambiguously made available to him to justify being satisfied that he had been fairly treated. Accordingly, there had been an infringement of the principles of natural justice and the matter would be remitted for the question of remedy to be considered. It was submitted on behalf of the employee that, in any event, even if the tribunal could properly conclude that it was not just and equitable to grant compensation, they could not strictly and in accordance with section 116 of the Employment Rights Act 1996 have refused to grant the remedies of reinstatement or re-engagement for the reasons they gave. It was not necessary, finally, to decide that matter, but it did seem that the employment tribunal probably did have a broad discretion to do what was just and was not limited by section 116 only to take into account the matters there referred to. It would be very strange if a tribunal were entitled to award no compensation under the *Devis v Atkins* principle but could not, on the same basis, refuse to make an order of reinstatement or re-engagement. Counsel for the employee recognised that it might properly be said that it would not be practicable for an employer to comply with such an order where it had lost trust and confidence in the employee but submitted that that was not the way in which the employment tribunal had framed their decision. Even if that analysis was strictly correct, the appeal tribunal would not have remitted the matter simply on the basis that the tribunal expressed their reason for refusing reinstatement or re-engagement on the broad ground that it was not just and equitable to do so, without saying in terms that it was not practicable to do so.

Iqbal v Consignia plc; 5 December 2002; EAT/1364/01
EAT: Elias J, Mr M Clancy and Mr T Haywood

UNFAIR DISMISSAL

An employee was dismissed, after 24 years with his employer, on the ground that he had taken a day's holiday when he was aware that he had not been entitled to do so. An employment tribunal rejected his complaint of unfair dismissal on the ground that the dismissal was not unfair.

KEITH J, on an appeal by the employee, said that a conventional approach to the evidence, in line with *British Home Stores Ltd v Burchell (Note)* [1980] ICR 303, would have been for the employment tribunal to consider whether the employer could reasonably have concluded that the employee had been aware that he had not been entitled to take the day's holiday. Instead, the tribunal decided *for itself* whether the employee had been aware of that and therefore whether he could not have been telling the truth in the course of a disciplinary hearing when he said otherwise. That was not a legitimate approach. The *Burchell* test was not simply *a* permissible approach to allegations of misconduct; it was the *only* permissible approach. In deciding for itself whether the employee had been guilty of misconduct, the employment tribunal apparently fell into error. The position could have been otherwise if what the tribunal had been doing was to reach its own conclusion on the basis of material before the employer in order to assess whether the employer's conclusion that the employee was guilty of misconduct was reasonable. But it was said by the employer that, whatever the issues for the employer at the disciplinary hearing, before the employment tribunal the only point taken on behalf of the employee was that in view of his very long service with the employer the ultimate disciplinary sanction of dismissal was too harsh, and it had *not* been contended that it had not been open to the employer reasonably to conclude that the employee had not been entitled to a day's holiday. If that was correct, any error made by the tribunal could not be said to have infected the tribunal's view as to whether dismissal was within the range of responses open to a reasonable employer. The tribunal had not substituted its own view for that of the employer on the question of the appropriate sanction. Thus, the outcome of the appeal depended on whether it had been contended on behalf of the employee in the employment tribunal that it had not been reasonably open to the employer to conclude that he had been aware that he was not entitled to take the day's holiday. The appeal tribunal had decided to take the course of adjourning further hearing of the appeal so that inquiries could be made of the employment tribunal as to whether that contention had been made on behalf of the employee. The tribunal's recollection would not be decisive, but would be regarded as just one of the factors to be taken into account. That course would not have been necessary if the employment tribunal had clearly identified the issues which it had had to decide.

Rajpra v Timet UK Ltd; 21 March 2003; EAT/827/02
EAT: Keith J, Mr D Norman and Mrs R A Vickers

VICTIMISATION

An employment tribunal upheld an employee's complaints of, inter alia, race discrimination and victimisation made against his employer and two individual officers of the employer.

JUDGE McMULLEN QC, dismissing an appeal by the respondents, said that the employment tribunal's findings of direct race discrimination and victimisation were strong because they were cogently organised and argued, so that one could see clearly the thinking behind each finding and the process of reasoning from which the tribunal moved from primary fact to inference to conclusion. The tribunal had directed itself according to the relevant provisions of the Race Relations Act 1976 and the relevant authorities. At the forefront of the respondents' complaints about the tribunal's decision was its decision on victimisation. The employee had contended that two protected acts within the meaning of section 2 of the 1976 Act had been taken: the issuing of a grievance and the service of a statutory race relations questionnaire. In *Waters v Comr of Police of the Metropolis* [1997] ICR 1073, 1097 Waite LJ considered a submission based on section 4(1)(d) (the relevant subsection for the purposes of the present appeal) and rejected a submission that a broad approach was to be taken to protected acts. It seemed to the appeal tribunal that for a complaint of a protected act to fall within the definition there had to be some way in which the discriminator could know that an assertion had been made which was linked to discrimination by him, contrary to section 6(2). The employee's grievance letter raised serious dissatisfaction with the individual officers; it did not in any sense reflect a complaint which related to race. It was a complaint of unfair treatment of him as an employee, making no specific or even general complaint based on race. It could not be said that the officers could or should have divined that the complaint was of race discrimination. Just because an employer had treated unfairly one of its employees who was black did not mean that it had done so because he was black, otherwise the rule in *Glasgow City Council v Zafar* [1998] ICR 120 would be given no purpose. An employer was equally capable of treating unfairly persons from a range of ethnic groups; it was contrary to the anti-discrimination statute when such action was on racial grounds or, in a case of victimisation, was because of the discriminator's knowledge that the person concerned had committed a protected act. The first protected act relied on—the grievance—did not fall within section 2(1)(d); but it was accepted that the questionnaire was a protected act. As a matter of reality, the questionnaire was followed by steps directly targeted at the employee which involved his selection for redundancy. The causal connection between the two was made by the employment tribunal; that was a matter of fact for that tribunal. The appeal tribunal saw no reason to interfere with it, based as it was on the extremely powerful infrastructure of findings and reasons. As to the substantive discrimination, the overall impression which the tribunal was enjoined to make—see *Anya v University of Oxford* [2001] ICR 847—was one which emerged clearly from its reasoning. It found a string of incidents over a short period which were in themselves discriminatory and which, as a whole, also created a full landscape of discrimination. It could not be said that the tribunal's findings were findings which no reasonable tribunal could have made.

The Prince's Trust v Beckford; 6 February 2003; EAT/303/01
EAT: Judge McMullen QC, Ms K Bilgan and Mr D J Hodgkins

ANNUAL LEAVE

On a claim by a police officer, pursuant to his entitlement to annual leave under regulation 13 of the Working Time Regulations 1998, for holiday pay outstanding at the time of his retirement, an employment tribunal found that he could not rely on his actual holiday year which commenced on 1 April because, as he was not employed under a contract of employment, there was no "relevant agreement" which provided for a specified date within the meaning of regulation 13(3)(a) and that his annual leave year had to be taken to have commenced on 1 October by reason of regulation 13(3)(b)(i).

JUDGE PETER CLARK, allowing an appeal by the applicant, said that the special position of police constables under the Working Time Regulations 1998 was regulated by regulation 41(1) which provided that for the purposes of the Regulations the holding of the office of constable was to be treated as employment under a worker's contract. As the chairman found, the applicant's terms and conditions of service were determined by the provisions of the Police Regulations 1995, under which his "leave year" was the period of 12 months beginning on such date as might from time to time be determined by the police authority, and, by standing order, the annual leave year was from 1 April. Applying the deeming provision in regulation 41(1), the term as to the applicant's leave year contained in his conditions of service had to be treated as a term of his employment under a worker's contract. Regulation 41(1) was not concerned only with deeming a police constable to be a "worker" for the purposes of the Regulations; it was clear that a constable's office was to be treated as employment under a worker's contract. In the present case that was a contract of employment, applying the first limb of the definition of worker's contract in regulation 2(1). By regulation 13(3) a worker's leave year began (a) on such date as might be provided for in a relevant agreement, or (b) where there was no such applicable provision, 1 October. The issue was whether the applicant could point to a relevant agreement which determined a date for the beginning of his leave year. The respondent submitted that it was a prerequisite of the definition of "relevant agreement" that there was an agreement between the parties, whereas the Police Regulations did not constitute such an agreement. The standing order could be varied unilaterally by the chief constable. The appeal tribunal preferred the applicant's submission. A contract of employment was by definition an agreement which was legally enforceable between the parties to it. The applicant was deemed to be employed under a worker's contract. There was a deemed agreement between the parties. It was common ground that the provision relied on by the applicant was legally enforceable. It followed that the tribunal fell into error in finding simply that the applicant had no contract of employment. He was deemed to be employed under such a contract by virtue of regulation 41(1) and there was a relevant agreement under which the start date was 1 April. The fall back date under regulation 13(3)(b) was not engaged.

Hyman v Chief Constable of South Wales Police; 8 April 2003; EAT/892/02
EAT: Judge Peter Clark, Mr C Edwards and Mrs M McArthur

PRACTICE

An employment tribunal chairman, sitting alone, heard and dismissed complaints by an applicant of breach of contract and unauthorised deduction of wages, without intimating to the parties that she was exercising her discretion to sit alone and without reference to the matters set out in section 4(5) of the Employment Tribunals Act 1996.

LORD JOHNSTON, allowing an appeal by the applicant, said that the applicant submitted that, where, on the face of it, at least one of the provisions of section 4(5) appeared to apply, there was a duty on the chairman to exercise a discretion and so to intimate to the parties. The respondents submitted that, properly understood, the discretion that was plainly vested in the chairman under subsection (5) could be exercised at any time and must have been exercised when the original intimation of the hearing stated that the chairman would be sitting alone. They further submitted that, in any event, by proceeding with the case the applicant had either tacitly accepted the position or waived the right to object. The appeal tribunal did not consider that waiver or tacit acceptance could apply in respect of a duty that was mandatorily imposed on the chairman in relation to the exercise of a discretion. The word "proceedings" in section 4(5) meant the actual hearing and, accordingly, it was incumbent on a chairman intending to sit alone where provisions of that subsection might apply to raise the matter with the parties at the beginning of the hearing and, accordingly, exercise his discretion if he continued to sit alone. Since there was no indication of any discretion whatever having been exercised, following the route taken by the Employment Appeal Tribunal in *Harman v Town and Country Veterinary Group* (unreported) 30 May 2001, EAT/71/01, the decision would be quashed and the matter remitted for rehearing before a fresh tribunal, in the expectation that the chairman of that tribunal, if intending to sit alone, would exercise his or her discretion and give reasons therefor at the start of the proceedings.

Dressel v Partnership Housing Ltd; 19 March 2003; EATS/48/02
EAT(Sc): Lord Johnston, Miss J A Gaskell and Mr R P Thomson

PART-TIME WORKER

An employment tribunal upheld claims by an employee that she had been unfairly dismissed and that she had been discriminated against as a part-time worker, contrary to regulation 5(1)(b) of the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000.

JUDGE PROPHET, dismissing an appeal by the employers, said that the employers submitted that legal analysis of what was required to constitute a breach under regulation 5 involved a four-stage process: (1) what was the treatment complained of; (2) was that treatment less favourable than that of a comparable full-time worker; (3) was the less favourable treatment on the ground that the worker was a part-time worker; (4) if so, was it justified? They submitted that the employment tribunal had failed correctly to analyse the first three stages, giving far too much emphasis to justification; that a correct analysis would have indicated that the applicant was dismissed not because she was a part-time worker but because the employers had made a commercial decision to have three full-time employees as accounting assistants; thus, she was dismissed on the ground of redundancy. The employment tribunal might not have worked through the stages with such precision; it was, however, apparent that they were fully cognisant with the treatment given by the employers to the applicant and were satisfied that she had thereby been treated less favourably than the comparable full-time accounting assistants. They stated in their reasons that the applicant was dismissed simply because she would agree to work only 32·5 rather than 37·5 hours. Clearly, therefore, they answered the third stage question in the affirmative, and, on the facts they found, that could not be a perverse conclusion. In interpreting the 2000 Regulations so as to give effect to their providing protection for part-time workers, an employment tribunal had to see what happened in its full context. Thus, in the present case "the treatment" incorporated the continued pressure on the applicant to work full time, that she would have to work full time if she wished to remain in employment, the selection process devised by the employers as it applied to the applicant (which meant her dismissal became inevitable) and, finally, her dismissal. As to justification, the tribunal recognised that it was for the employers to make a commercial decision that they were overstaffed, but the tribunal were entitled to look at all the circumstances, including that the applicant was a part-time worker who would be only five hours short of full-time service. Turning to unfair dismissal, the appeal tribunal accepted that, if the employment tribunal's reasoning was that a breach of the 2000 Regulations meant that the applicant was thereby automatically unfairly dismissed, that would be an error of law. However, the appeal tribunal was satisfied from a full reading of the reasons that they did not fall into that error.

Hendrickson Europe Ltd v Pipe; 15 April 2003; EAT/272/02
EAT: Judge Prophet, Mrs R Chapman and Mr C Edwards

TIME LIMIT

An applicant employee, who was suffering from ill health and had recently had an operation, posted a notice of appeal from a decision of an employment tribunal, together with the requisite documents, before the expiry of the 42-day period for appealing prescribed by rule 3 of the Employment Appeal Tribunal Rules 1993, but it was received by the Employment Appeal Tribunal one day out of time. He also handed in, within time, a copy notice of appeal, but it was not accompanied by the tribunal's extended written reasons as required by rule 3(1)(c). The Registrar of the Employment Appeal Tribunal, taking account of the fact that the appeal tribunal had previously applied the rules relating to receipt of an appeal with proper documentation in a lax manner so that the appellant had a legitimate expectation that the appeal would be accepted, granted the applicant an extension of time on the ground that an exceptional reason had been shown why the appeal could not have been presented within time.

BURTON J (PRESIDENT), dismissing an appeal by the respondent employers, said that, plainly, what the Registrar had been referring to was not any legitimate expectation on the part the present applicant, but to the fact that there had been a lax practice at the Employment Appeal Tribunal, though certainly not in relation to the lodging of a notice of appeal simpliciter within the 42 days. A different practice had operated, however, in relation to situations such as the present where a notice of appeal had been put in in time but it had not been accompanied by the necessary documents—in the present case, the extended reasons. That failure rendered the notice of appeal invalid. However, it had been regarded leniently and extensions of time granted. That had to stop, and certainly since the new Practice Direction [*Practice Direction* (*Employment Appeal Tribunal: Procedure*) [2002] ICR 122] there had been no application for an extension of time on that basis. The present case signalled the end of any laxity in that regard. The present case was, however, an appropriate one, not only because of the particular compassionate circumstances, but because it would be used as a signal of the end of the previous practice, for the grant, in the exercise of the Registrar's decision, of what was only a one-day extension of time. The respondent employers had raised, but not pursued, a subordinate point on paragraph 3(2) and (3) of the Practice Direction, asserting that, contrary to paragraph 3(2) the application for an extension of time had not been made at the same time as the notice of appeal. It was right that there should be such a paragraph in the Practice Direction, because in the normal course—that an appellant was out of time and knew that—there had to be an obligation to serve simultaneously the notice of appeal and an explanation for its delay. But paragraph 3(2) could not be intended to be wholly prescriptive and exclusive. That could be seen from the very existence of paragraph 3(3), which would be unnecessary if paragraph 3(2) were all governing. There would, no doubt, be cases, such as the present, where, when the notice of appeal was despatched, it was not appreciated that it would be out of time, and in those circumstances it was not practicable for it to be accompanied by an application for an extension of time. In such cases, when it was appreciated that the notice of appeal had been lodged out of time, it would then become appropriate as speedily as possible to follow it up with an explanation in accordance with paragraph 3(2) of the Practice Direction.

Kanapathiar v Harrow London Borough Council; 25 February 2003; EAT/1281/02
EAT: Burton J (President) (heard in chambers and judgment given in open court)

APPEAL

On an appeal by an applicant against the dismissal by an employment tribunal of her complaints of wrongful dismissal, unfair dismissal and failure to pay wages, the appeal tribunal gave directions requiring the applicant to lodge an affidavit giving details of alleged bias or improper conduct on the part of the employment tribunal, in default of which certain grounds of appeal were to be dismissed.

JUDGE PETER CLARK, dismissing an application by the applicant to revoke the requirement to lodge an affidavit, said that the applicant submitted that her grounds of appeal did not raise allegations of *bias* against the employment tribunal and no requirement for an affidavit arose. Bias not was alleged, but the grounds of appeal did allege procedural irregularity amounting to a breach of her right to a fair trial and misconduct on the part of the chairman in recording an agreement between the parties which was "completely false". In those circumstances it was right to adopt the affidavit procedure. Like any court or tribunal the Employment Appeal Tribunal's orders were made to be complied with. In the case of non compliance, by rule 26 of the Employment Appeal Tribunal Rules 1993, the appeal tribunal could order that the party in default should be debarred from taking any further part in the proceedings or make such other order as it thought just. That included the power to strike out all or any grounds of appeal. The procedure contained in *Practice Direction (EAT: Procedure)* [2003] ICR 122, para 11 was required to allow the appeal tribunal to determine as a fact what had taken place below where bias, misconduct or procedural irregularity was alleged; that necessarily extended the time for determining the appeal. The approach in *Roberts v United Friendly Insurance plc* (unreported), 13 June 1996 to accept the word of the chairman as to what had happened below had not survived the guidance given by a very strong Court of Appeal in *Lockabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451, applied in *Facey v Midas Retail Security Ltd* [2001] ICR 287, 301, para 35. If the affidavit procedure was to be followed it was essential that parties comply with all directions given. Otherwise unnecessary delay would follow. The applicant further submitted that her case fell within CPR, Part 2, PD.B, para 7A(1), which provided: "A deputy High Court judge . . . may not try—(1) a case in a claim made in respect of a judicial act under the Human Rights Act 1998 . . ." In the view of the appeal tribunal, para 7A was concerned with claims under section 7(1)(a) of the Human Rights Act 1998 against the appropriate authority. In the present appeal the applicant was not bringing a claim against the employment tribunal under that Act, but was seeking to rely on her rights under article 6(1) of Schedule 1 to the Act in the appeal (section 7(1)(b)). Thus, circuit judges, who coincidentally also sat in the High Court, were not prevented from sitting on the Employment Appeal Tribunal, being authorised to do so under section 24 of the Employment Tribunals Act 1996, to consider a point raised by a party in the appeal in accordance with section 7(1)(b) of the 1998 Act. The applicant had also challenged the practice of ex parte preliminary hearings, submitting that it amounted to a requirement of permission to appeal. That was not accepted. The procedure was not akin to the permission system elsewhere, since an order dismissing an appeal, following a hearing, at the preliminary stage was then subject to appeal, with permission, to the Court of Appeal. Section 21(1) of the 1996 Act limited the appeal tribunal's jurisdiction to hearing appeals on a question of law only. If an appeal was dismissed at the preliminary hearing stage it would be on the basis that no error of law was made out, and, if that judgment was wrong, it could be corrected by the Court of Appeal. While the appeal tribunal continued to use the pre-CPR expression "ex parte" in circumstances where the respondent to an appeal had no right of audience at the preliminary hearing, save as to directions for the future conduct of the appeal, that procedure, designed to save expense for a respondent in an appeal which ultimately failed, did not exclude written representations by the respondent to which the appellant had every opportunity to respond at the oral preliminary hearing.

Riniker v Waymark Holidays Ltd; 30 April 2003; EAT 61/03
EAT: Judge Peter Clark, Mr P R A Jacques and Miss D Whittingham

JURISDICTION

A complaint by a civilian member of staff at a police station that she had been sexually assaulted by a police inspector was heard by a disciplinary board, established in accordance with the Police (Discipline) Regulations 1985, which consisted of three male commanders. She complained to an employment tribunal that the board had subjected her to sexual harassment in their conduct of that hearing. The employment tribunal determined as a preliminary issue that the function of the disciplinary hearing was to arrive at a judicial, and not an administrative, determination and that thereby it enjoyed absolute immunity from complaints about its conduct of the hearing.

RIMER J, dismissing an appeal by the applicant, said that the question raised by the appeal was whether the disciplinary hearing inquiring into the charge against the inspector constituted proceedings of a tribunal enjoying the like absolute privilege as was enjoyed by proceedings before a court. The best guide to the resolution of the question was the House of Lords decision in *Trapp v Mackie* [1979] 1 WLR 377, in which Lord Diplock identified four matters which needed to be considered when deciding on which side of the line any particular case might fall. The first was that the tribunal had to be one recognised by law. There was no issue about that: the hearing was constituted under the 1985 Regulations. The second matter was the nature of the question into which the tribunal was required to inquire. The issue before the disciplinary hearing was closely analogous to the type of issue which arose in courts of justice. It was in the nature of a trial, under a procedure recognised by law, of a disciplinary charge which could result in a range of punishments from dismissal to a caution. Its nature was capable of resulting in the proceedings enjoying absolute privilege. The third matter was the procedure adopted by the tribunal, and the procedure required to be adopted at the disciplinary hearing was also, in its essentials, akin to that adopted by courts trying civil or criminal cases. The fourth matter was the legal consequence of the conclusion reached by the tribunal as a result of the inquiry. The consequences of a decision of the disciplinary tribunal were either rather close to those of a decision of a court of justice or else were not relevantly distinguishable from the situation in *Trapp*: punishments could be imposed either directly by the board or other officer conducting the hearing, or else on their recommendation. Either way the decision was finally binding on the accused, subject only to any appeal. The essential features of the disciplinary hearing rendered it closely analogous to a judicial proceeding before a court of justice, and the employment tribunal had been correct in their conclusion that the disciplinary hearing enjoyed the same absolute immunity as proceedings before a court of justice. Though the applicant's complaint was not so much about what was said at the disciplinary hearing but about the exclusively male constitution of the board and the failure of the board to control counsel's questions of her in cross-examination, the immunity extended to such complaints. Though the Sex Discrimination Act 1975 said nothing to the effect that tribunals enjoyed such immunity, the rule was a long-standing one of public policy and Parliament could be taken to have been aware of it when enacting the 1975 Act.

Heath v Comr of Police of the Metropolis; 12 May 2003; EAT/454/02
EAT: Rimer J, Mr C Edwards and Miss C Holroyd

TIME LIMIT

A complaint of unfair dismissal, presented by an applicant on 1 June 2001, was held to be out of time, where the applicant had accepted, on 2 March 2001, her employers' confirmation that she could retire, on grounds of ill-health, on 28 February 2001.

JUDGE PETER CLARK, dismissing an appeal by the applicant, said that it was acknowledged on behalf of the applicant that *Crank v Her Majesty's Stationery Office* [1985] ICR 1 and *Lambert v Croydon College* [1999] ICR 409 supported the propositions, first, that parties to a contract of employment might agree a retrospective effective date of termination and, secondly, that such agreement was not invalidated by section 203 of the Employment Rights Act 1996. It was, however, submitted that those cases were wrongly decided. Although the Employment Appeal Tribunal was not bound by its previous decisions, in the interests of comity it would normally follow a line of authority that was well settled unless it could be shown that the earlier decisions had been decided without full argument. It had to be assumed that the applicant's contract was terminated by the employers without notice under section 95(1)(a) of the Act. Section 97(1)(b) provided that "in relation to an employee whose contract of employment is terminated without notice" the effective date of termination "means the date on which the termination takes effect". The issue, under section 97(1)(b), was whether as a matter of fact the effective date of termination might be a date retrospectively agreed between the parties. It was submitted that a retrospectively agreed effective date of termination offended the provisions on continuity of employment, in particular section 212(1). It was contended that, on the facts, the applicant's relations with her employers were governed by a contract of employment after 28 February 2001; that the earliest date on which it could be said that the parties had agreed the ending of the contract was 2 March 2001, and the period 28 February to 2 March counted in computing her period of employment by virtue of section 212(1); and that the parties could not abridge that time by agreement, thereby extinguishing a period of continuous employment. The appeal tribunal rejected that submission. If the effective date of termination could be retrospectively agreed that would not offend the continuity provisions, which expressly provided for the effective date of termination as the end date for an employee's period of continuous employment under section 211(1)(b). Where the parties retrospectively agreed the date on which the contract ended that was the effective date of termination. The applicant also relied on section 203 of the 1996 Act, focusing on the words of subsection (1)(a) and submitting that, though the agreed termination date did not exclude the applicant's right to bring an unfair dismissal complaint, it limited that right by reducing the primary limitation period to less than three months. The fallacy in the submission was to *assume* that the true effective date of termination was the date on which the agreement was reached. However, an agreement as to the effective date of termination was no different from the parties agreeing a consensual termination of the contract, which had never been regarded as offending section 203(1). The appeal tribunal had not been persuaded to depart from the principles laid down in *Crank* and *Lambert*. Further, there were practical reasons for continuing to take the line that parties might agree a retrospective effective date of termination, just as they could agree to an extended period of notice. Permission to appeal.

Fitzgerald v University of Kent at Canterbury; 13 May 2003; EAT/474/02
EAT: Judge Peter Clark, Mr A E R Manners and Mr H Singh

[2003] ICR Part 10

COMPENSATION

An employment tribunal upheld complaints of unfair dismissal by employees who had been dismissed following the transfer to new owners of the pub where they worked but made no separate award for a failure to consult in accordance with regulations 10 and 11 of the Transfer of Undertakings (Protection of Employment) Regulations 1981. The tribunal also deducted earnings by one employee from another job undertaken during and after his employment, when calculating his compensatory award.

JUDGE BIRTLES, allowing an appeal by the latter employee, said that, on the first matter, the employees had to rely on regulation 11(4)(a) of the 1981 Regulations, and the issue, therefore, was what that provision meant. It was argued that it required the employment tribunal to do two things: first, to make a declaration that there had been a breach of the consultation procedures; and, secondly, to award appropriate compensation as specified in regulation 11(11). The respondent transferees argued that the language of regulation 11(4) was quite clear: the tribunal "shall"—and therefore must—make a declaration, but it "may" award compensation—it was not required to do so. In the judgment of the appeal tribunal, that was correct. Parliament was to be taken to be well aware of the difference between the mandatory "shall" and the permissive "may". The use of the disjunctive "or" separating paragraph (a) from paragraph (b) of regulation 11(4) did not alter that conclusion. The employment tribunal was fully entitled on the facts not to make an award of appropriate compensation under regulation 11(4)(a) if it thought it could do justice to the case by taking it into account in its award of the compensatory element of dismissal. There was no error of law. The final ground of appeal was that the tribunal had erred in law in taking into account the employee's income from his other job in calculating his award. The loss suffered by the employee, for the purposes of section 123(1) of the Employment Rights Act 1996, was the loss of his weekly wage paid by the transferor. He did not lose the wages paid by his other job. That payment and that employment had nothing to do with any respondent. It predated the dismissal and continued after it; it was separate employment. Furthermore, the common law duty to mitigate loss under section 123(4) could not operate so as to enable a tribunal to reduce compensation payable under section 123(1) in the present circumstances. The duty to mitigate loss applied only to employment which commenced after dismissal. To do otherwise would be to unjustly reward an employer for dismissing an employee who had the initiative and energy to have alternative employment which predated dismissal. That could not be just and equitable in all the circumstances, and the employment tribunal had made an error of law in adopting that approach.

Mansi v Warne; 20 May 2003; EAT/853/02
EAT: Judge Birtles, Mr A D Tuffin and Miss D Whittingham

DISABILITY DISCRIMINATION

An employee suffered an injury to his hand while at work, as a carpenter, and, though thereby disabled for the purposes of the Disability Discrimination Act 1995, he wanted to return to work and requested a trial period to demonstrate that he was able to perform his duties. The employers carried out a controlled assessment of the employee involving a series of typical tasks, but had doubts about his safety and he was dismissed. An employment tribunal upheld a complaint by the employee of disability discrimination on the ground that by refusing to allow the employee to return to work for a trial period to see what he could do the employers had failed in their duty to make adjustments under section 6 of the Act and that the failure was not justified.

MR COMMISSIONER HOWELL QC, allowing an appeal by the employers, said that there were two separate and distinct questions to be asked under sections 5 and 6 of the 1995 Act when a complaint was made that a failure to make reasonable adjustments in accordance with section 6 had resulted in discrimination, so that the detriment to which it gave rise became unlawful conduct on the part of an employer of which complaint might be made under section 4. On the first question under section 6(1) the assessment of what steps it was reasonable for an employer to have taken in order to comply with its duty, and whether it had failed, was to be determined objectively according to the tribunal's own view of what was or was not reasonable in the circumstances of a particular case. Having established that there had been such a failure, a tribunal was then required by section 5 to go on and consider the *separate* question under section 5(2)(b) of whether the employer "cannot show that his failure to comply with that duty is justified". Only if that separate condition was also met could a finding of discrimination for the purposes of section 5 be made. That the language used in section 5(2)(b) did require that separate question to be addressed, even in the case of an established failure to do what the tribunal considered reasonable under section 6, was apparent from *Prison Service v Beart* [2003] ICR 1068 and from the Court of Appeal's consideration of the identical language in section 5(1)(b) in *Post Office v Jones* [2001] ICR 805. Under that wording the question of whether the employer could show the defence of justification was not only a separate one from that of reasonableness under section 6 but one involving a different and (for the employer) less onerous standard. In particular, the effect of subsections (3) and (4) meant that all that was to be addressed was whether the reason put forward by the employer as justification was (a) material and (b) substantial. Provided those not very demanding thresholds were met, it was not for the employment tribunal to substitute its own view on whether it considered that showed a reasonable justification for the treatment or failure in question. The interpretation in *Jones* had to be regarded as binding also for the purposes of section 5(2)(b). On that footing the tribunal's expressed reasons embodied a material misdirection in that consideration of whether there had been a failure on the part of the employers to take reasonable steps under section 6 and whether the defence of justification under section 5(2)(b) had been established was regarded as depending on the *same* circumstances and for practical purposes as the same inquiry, instead of having to be differentiated with two different tests to be applied. It was apparent that the tribunal's conclusions depended on their own assessment of what *they* considered it reasonable for the employers to do, and their reasons contained nothing to show that they regarded justification as depending on different questions and a different test or that they were directing themselves to the less stringent standard required by the wording of section 5(2)(b) as laid down in *Jones*.

Royal National Theatre Board Ltd v Collins; 29 April 2003; EAT/642/02
EAT: Mr Commissioner Howell QC, Mr J R Crosby and Mr A D Tuffin

UNFAIR DISMISSAL

An employment tribunal upheld complaints of unfair dismissal made by employees complaining of a failure by their employer to consult with them prior to redundancy but made no award of compensation on the basis that the employees would have been dismissed in any event.

LORD JOHNSTON, allowing an appeal by the employees, said that the employees argued that the tribunal's decision to assess the likelihood of dismissal in any event at 100% was illogical, since it failed to give any effect to what might have been the result of a consultation process if it had been properly carried out. They submitted that the failure of the employer to embark on a fair consultation process was a substantive one, consequently, having an effect inasmuch that there was a denial of opportunity and it could not be said that if that opportunity had been given a different result would not have been achieved. The employer submitted that the issue was one of fact to be determined by the employment tribunal on the evidence. The appeal tribunal agreed that, on the evidence before them, the tribunal were entitled, having determined the issue of fairness, to conclude nevertheless that the employer would be bound to effect the redundancies in any event. However, the appeal tribunal was concerned that the employment tribunal did not consider the question of whether or not the employees' period of employment might have been extended to some extent if the consultation process had been properly carried out. Accordingly, it was appropriate to remit the matter to the same tribunal for them to consider, on the facts they had found proved, whether or not the consultation process might have extended the employment period and, if so, to what extent; alternatively, whether proper consultation would have had the result that the employees would have sought other employment at an earlier date, which might also reflect on the issue of compensation. If the tribunal did so conclude, compensation would be awardable in respect of the relevant loss of weekly pay. If the tribunal determined that the same date would in fact have been achieved because of the attitude of the employer, no compensation would be awardable.

Jardine v Cameron Linn Ltd; 5 June 2003; EATS/50/02
EAT(Sc): Lord Johnston, Mr A G McQuaker and Mr M G Smith

BREACH OF CONTRACT

An employee, who was transferred from typing to clerical duties and lost her typing proficiency payments, made a complaint of breach of contract before her employment terminated, on grounds of ill-health. The employment tribunal held that it had no jurisdiction to hear the claim, as it had not been presented within the three-month period beginning with the effective date of termination of the contract, as prescribed by article 7(a) of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994. The tribunal also considered whether the claim could be treated as a claim for unlawful deduction of wages under section 13(1) of the Employment Rights Act 1996, but concluded that it could not as it "was plainly and unambiguously expressed as being for breach of contract only".

JUDGE BURKE QC, allowing an appeal by the employee, said that, if the employee's claim was a claim in respect of wrongful deduction under Part II of the 1996 Act, it was at least plainly arguable that it related to a series of such deductions and therefore would have been in time, because it had been presented before the end of the period of three months beginning with the last deduction. Therefore, if such a claim had been before the tribunal, it would have been open to it to find it had jurisdiction. The appeal tribunal agreed with what was said by the appeal tribunal in *Miller Bros & F P Butler Ltd v Johnston* [2002] ICR 744, 749–750, para 26, and that one must not strive to find jurisdiction by an artifice where jurisdiction did not exist. On behalf of the employee it was submitted that the employment tribunal had erred in concluding that her claim could not properly be viewed as a wrongful deduction claim. It was significant that the employers conceded that, if the employee had been compulsorily transferred, she would have had a contractual entitlement to the proficiency payments, and it was submitted that in their notice of appearance the employers had responded directly to that, by setting out in considerable detail the facts on which they based their case that she had transferred voluntarily. The appeal tribunal accepted that the two causes of action or heads of claim were different and that there might be many situations in which a breach of contract claim could not, on any view, be said to be also a wrongful deduction claim. However, in cases in which the employee asserted that she should have been paid moneys to which she was contractually entitled, the claim could be put both in debt, as a claim for moneys due that had not been paid, because there had been a wrongful deduction, and in damages as moneys lost by reason of the employer's breach of contract in failing to pay, which fell within the 1994 Order. Any fair reading of the employee's originating application could only tell the reader that she was asserting that she was contractually entitled to the payments she sought but had not received. The question the tribunal needed to pose was whether in substance the claim was not only one for breach of contract but also for unlawful deduction of wages. Had the employment tribunal properly directed itself to that question, it could only have answered it in the affirmative. The claim did contain a claim for wrongful deduction and the employment tribunal erred in law in dismissing it on the basis that it consisted only of a claim under the 1994 Order, as to which, admittedly, there was no jurisdiction.

Whitmore v Inland Revenue Comrs; 1 April 2003; EAT/727/02
EAT: Judge Burke QC, Mr K Edmondson and Mr D S Smith

EMPLOYER'S INSOLVENCY

The applicant employees were dismissed when their employer ceased trading. The Secretary of State for Trade and Industry refused their applications for redundancy and other termination payments, and an employment tribunal chairman, relying on a statement by a licensed insolvency practitioner, found that the employer was insolvent within the meaning of section 183 of the Employment Rights Act 1996 and made an order in favour of the applicants.

JUDGE PETER CLARK, allowing an appeal by the Secretary of State, said that the issue on the appeal was whether the employer was insolvent within the meaning of section 183 of the 1996 Act. Where an employee was dismissed by reason of redundancy and did not receive a redundancy payment from his employer he could recover payment from the Secretary of State in the circumstances prescribed by section 166(1) of the Act. Insolvency was defined in section 183, and those provisions had been the subject of consideration by the Employment Appeal Tribunal in number of cases. The relevant principle to be derived from those cases was that it was for the employee to establish that the statutory definition of insolvency was satisfied. It was not enough simply that the employer had ceased trading, could not pay his debts or was otherwise in some form of financial difficulty. The Secretary of State had disputed before the employment tribunal that the employer was insolvent within the meaning of section 183. In his extended reasons the employment tribunal chairman purportedly found as a fact that the employer was insolvent. The licensed insolvency practitioner had said so. That was simply not enough. The word "insolvency" had different meanings in different contexts. Precisely what the practitioner meant by that expression was unclear. What was clear was that the practitioner did not mean that the employer was insolvent within the meaning of section 183, because, in reply to questions from the Department of Trade and Industry, the practitioner answered that the employer had not been adjudged bankrupt and had made no composition or arrangement with his creditors. The appeal tribunal did not, however, need to rest its decision on that exchange of letters, because it was satisfied that there was no evidence before the chairman that either of the limbs of section 183(2)(a)(i) had been satisfied. Accordingly, the finding that the employer was insolvent for present purposes could not stand.

Secretary of State for Trade and Industry v Key; 7 May 2003; EAT/1356/01
EAT: Judge Peter Clark, Ms G Mills and Mr J C Shrigley

EMPLOYMENT APPEAL TRIBUNAL

An appeal from an employment tribunal was dismissed by the Registrar of the Employment Appeal Tribunal for failure by the appellants to comply with an order to serve further and better particulars of their notice of appeal which had been made "on paper" and sent by separate letter when the appeal was listed for preliminary hearing.

BURTON J (PRESIDENT), allowing an appeal by the appellants, said that it seemed that the letter enclosing the order for further particulars was never received by the appellants, and so they did not comply with it, though they complied with other obligations and filed a skeleton argument. An order striking out an appeal by virtue of default was a more or less administrative order, but it had very considerable consequences. Unless an order specifically stated that, on failure to comply, the appeal would be dismissed without further notice to the relevant party, there should always be such notice, albeit by reference to a very short time scale, to give the party whose appeal was about to be dismissed the opportunity to make representations. Accordingly, save in the case of an order specifically indicating that no further notice would be given to either party, it was ordinarily appropriate for a judgment in default not to be entered where it was alleged that there had been a failure to comply, without at least checking that the party in question did receive notice of the order. In the present case neither the Registrar nor the respondent to the appeal knew that the appellants had not received the order in question when the order dismissing the appeal was made. When the appellants received the order dismissing the appeal they made an application under rule 33 of the Employment Appeal Tribunal Rules 2001. That appeared entirely appropriate, as rule 33 would apply just as much to a decision made on behalf of the appeal tribunal as to a decision of the full tribunal. In any event the Registrar did not entertain a review under rule 33, but treated the appellants' application as an appeal against her order. Hence the present appeal which had plainly incurred some expenditure of costs on both sides. Where there was an application for a review which was capable of being dealt with "on paper", that course ought ordinarily to be followed, rather than listing inter partes a hearing by way of appeal. Since no fault could be ascribed to the appellants, who otherwise acted diligently in accordance to what they understood to be their obligations and at the earliest opportunity applied for a review, the appeal would be allowed.

Baker & Co v Marenah; 11 June 2003; EAT/77/03
EAT: Burton J (President) (as in chambers)

TEACHER

A teacher was given notice that her employment would terminate, on ill-health grounds, on 30 April 2000, by a letter from the local education authority which she received on 7 February 2000, following a meeting on 3 February of an appeal committee of the governing body of the school where she worked. An employment tribunal dismissed her claims of unfair dismissal and breach of contract.

JUDGE PROPHET, allowing an appeal by the applicant, said that there was no evidence which indicated that there had been a specific notification in writing by the governing body to the local education authority of the governing body's determination and the reasons for it, as was required by the School Standards and Framework Act 1998, Schedule 16, paragraph 25. It could not be accepted that subsequently circulated minutes of the appeal hearing constituted compliance with the statutory procedure. It was difficult to accept that the local authority had been in a position to send the termination notice when it did. However, since both parties accepted the fact of the applicant's dismissal, the question was whether she had received such notice as she was entitled to under her contract. It was common ground that she was on the maximum of 12 weeks for statutory notice purposes and that a notice period under a written notice did not include the day it was received. Thus, the period would begin on 8 February and extend to 1 May 2000, and it was a breach of the applicant's contract for notice to end on 30 April. In the usual way such breach would have little practical effect, but in the case of a teacher special consideration had to be given to the contractual requirement which on the face of it required that notices had to end on one of three specific days. The appeal tribunal accepted the submissions on behalf of the applicant that the effect of the statutory requirement was to modify the contractual terms to substitute 12 weeks for two months, with the requirement for a proper notice to expire on one of the three specific dates remaining intact. Thus, the only proper notice which the applicant could have received on 7 February 2000 was one expiring on 31 August 2000. Common sense suggested that weight should be given to the importance of notices relating to teachers ending at the end of school terms. The employer urged the appeal tribunal to find, as the employment tribunal had, that the applicant received oral notice through her representative at the appeal hearing on 3 February 2000, or at least by communication prior to 7 February. Employment law had always stressed the importance of the fact of dismissal being properly communicated to the employee. It should not arise by inference. Paragraph 25 of Schedule 16 to the 1998 Act made it clear that the local authority representative had been in no position to give notice to the applicant, even if she had been at the hearing on 3 February, because the required written notification by the governing body to the local authority had not been given. Notwithstanding the inevitability of the statutory process, notice to the applicant terminating her contract had to been given directly to her by the local authority, and that had occurred at the earliest on 7 February 2000. Consequently there was a breach of contract. The conclusions reached on the present appeal were essentially based on the particular circumstances of the applicant's position, but all education authorities had to be aware that there were strict statutory requirements to follow where the dismissal of a teacher was involved.

Hughes v Governing Body of Archers Court School; 14 January 2003; EAT/1444/01
EAT: Judge Prophet, Mr S M Springer and Mr R N Straker

DISCLOSURE

An employment tribunal upheld a refusal by a respondent local authority to disclose documents relating to, inter alia, the applicant's unfair dismissal complaint, relying on section 49(1) of the Audit Commission Act 1998, which prohibited disclosure of documents obtained by the district auditor unless the person to whom the information related consented.

BURTON J (PRESIDENT), allowing an appeal by the applicant, said that section 49 of the 1998 Act did not have to be construed in the draconian way in which the employment tribunal chairman had construed it. The phrase "No information . . . obtained by the [Audit] Commission or an auditor . . . shall be disclosed" in that section related to (1) documents created by the auditor from information, such as transcripts or notes of, or statements made or drawn up by the auditor or his staff from, information supplied by, or meetings held with, informants, or memoranda or documents prepared by the auditor or his staff resulting from such information or meetings or communications; and (2) documents created by others for the purpose of submission to the auditor or the Commission. Thus, for example, if a would-be informant prepared a statement, created a memo, sent a letter or e-mail, or caused or permitted a lawyer to do so on his behalf, then that document would fall within section 49. In order to construe section 49 compatibly with the Human Rights Act 1998, and in particular with the rights of a litigant in civil proceedings under article 6 of the Convention, such preclusion did not extend to documents the disclosure of which was not otherwise precluded by some privilege but which happened to have been supplied to the auditor, but originals or copies of which *remained* in the possession, custody or power of the person who supplied them to the auditor, from which person disclosure or production was then properly sought. Such documents could not be cloaked with a privilege from production simply because they happened to have been provided to the auditor. If they were disclosable in the hands of the person who supplied them to the auditor *before* he supplied them, then they remained subject to disclosure and the simple fact that they or copies might have been supplied to the auditor during an investigation could not render them precluded from disclosure. Only one of the documents fell within the precluded area; the others would be ordered to be disclosed.

Brennan v Bedford Borough Council; 30 June 2003; EAT/317/03
EAT: Burton J (President)

NOTICE PAY

The applicants, who were carpenters, were contractually obliged to carry out work personally under the direction of the respondents' foremen, mainly using tools provided. They worked under terms whereby the respondent deducted income tax at 18% from their wages and they were responsible to the Inland Revenue for any further tax due. They were paid weekly on the basis of a daily rate but with a bonus for a full week's work. When they were dismissed, they made claims for unlawful deductions in respect of, inter alia, holiday pay and pay in lieu of notice. The employment tribunal chairman found that the applicants were "workers" for the purposes of regulation 16(1) of the Working Time Regulations 1998, and so entitled to holiday pay, but that they were in an intermediate category of workers able to look after their own interests when it came to holiday pay which was rolled up in the agreed rate of pay; and that they were not "employees" for the purposes of section 86 of the Employment Rights Act 1996, and so not entitled to the notice periods there provided.

JUDGE REID QC, allowing an appeal by the applicants, said that as a matter of economic reality the applicants were employees. They bore no risk; their pay was on a time basis; they were not paid by output. While the applicants were accepted by the Inland Revenue scheme, it did not automatically follow that they were not employees. There was no indication that any real thought had been given to their status, and the fact that they were working under the scheme should not be regarded as of any great significance. When all the other factors were taken into account, the relationship between the respondent and the applicants, properly analysed, was one of employer and employees. Accordingly, on that basis they were entitled to an award of one week's pay in lieu of notice. If, as the chairman found, the applicants had been workers but not employees, their claim would have failed for want of jurisdiction. When a worker was taken on for an indefinite period to work on a job, it was implicit in his engagement that it would not be terminated without cause except on reasonable notice. What amounted to reasonable notice would depend on the circumstances. The reasonable period of notice in the applicants' case, had they been workers but not employees, would have been one week, and they would have been able to recover an amount equal to one week's wages by way of damages for breach of contract; but that recovery would have had to have been in the county court. In respect of the holiday pay, the appeal tribunal differed from the tribunal chairman. There was no agreement that the applicants' pay included any provision for rolled up holiday pay. The only reference to it was in a document headed "Registration & Safety Card", which was produced after they had been engaged and their terms fixed. Even then they were not given copies. It could not vary the previously agreed terms.

McCarthy v Blue Sword Construction Ltd; 14 July 2003; EAT/223/03
Judge Reid QC, Mr B V Fitzgerald and Mrs T M Prosser

STRIKING OUT

Prior to the hearing of an unfair dismissal complaint, an employment tribunal received a letter from the applicant employee alleging threatening behaviour by the employer towards him. The tribunal decided to treat the letter as an application to debar the employer. When the application came on for hearing the employer was not present, as he had not been given notice, and the tribunal found that he had conducted the proceedings in a way that was unreasonable and, pursuant to rule 15 of the Employment Tribunals Rules of Procedure 2001, struck out his notice of appearance. The tribunal later set the order aside and had a further hearing of the application with the employer present, when it again concluded that the employer's behaviour had been unreasonable and ordered the notice of appearance to be struck out. It went on to hear the complaint without allowing the employer to take part in the proceedings and found that the applicant had been unfairly dismissed.

BURTON J (PRESIDENT), allowing an appeal by the employer, said that the course taken by the tribunal was inappropriate. Once it was apparent that it was not the employer's fault that he had not attended the first hearing it should have been treated as a nullity and the case restarted. On that basis alone the decision to strike out the notice of appearance could not stand. Two possibilities arose as to the order debarring the employer from defending the applicant's unfair dismissal claim: either a rehearing by an employment tribunal of the question whether the employer should be debarred from defending the case, or the appeal tribunal reaching its own decision on the debarring application. The power under rule 15(2)(d) of the Rules of Procedure only arose if either the tribunal had sent a notice to the relevant party or he had been given an opportunity to show cause orally by virtue of rule 15(3). Because of the unsatisfactory nature of the two-part hearing that had occurred in the present case, there would have been a very substantial question as to whether it could be said that the employer had been given such an opportunity simply by virtue of his having been allowed in to the second part of the hearing, not having heard the first part. But, quite apart from procedural matters, there were questions requiring to be decided by a tribunal properly faced with an issue under rule 15(2)(d). First, there had to be a conclusion not simply that a party had behaved unreasonably but that *the proceedings had been conducted* by or on his behalf unreasonably. It was clear that there had been no such finding by the employment tribunal. It might well be that, on appropriate facts, a tribunal might find that a threat that unless proceedings were withdrawn some course could be taken amounted to a scandalous method of conducting the proceedings. Secondly, it was plain from *De Keyser Ltd v Wilson* [2001] IRLR 324 that, in ordinary circumstances, even assuming a finding that proceedings had been conducted scandalously, unreasonably or vexatiously, before there could be a strike out of a notice of appearance, or originating application, there had to be a conclusion as to whether a fair trial was or was not still possible. The reason for that question was that a striking out order was not simply regarded as punishment. Thirdly, once it had been concluded that the proceedings had been conducted in breach of rule 15(2)(d) and that a fair trial was not possible, there still remained the question as to what remedy the tribunal considered appropriate, which was proportionate to its conclusion. It was also possible that there could be a remedy, even in the absence of a conclusion that a fair trial was no longer possible, which amounted to some kind of punishment, but which, if it did not drive the party from the judgment seat, might still be an appropriate penalty to impose, provided it did not lead to debarring the party from the case in its entirety. Fourthly, even if the question of a fair trial was found against the party, the question still arose as to consequence. Any tribunal making an order had to ask what the appropriate consequence was. As a result of rule 3(3) a respondent who had not entered an appearance was not entitled to take any part in the proceedings, but that did not prevent the tribunal, pursuant to its case management powers under rule 4 or its powers to regulate its own procedure under rule 15, making appropriate and proportionate orders. An option might be to debar a respondent from taking any further part in the liability hearing but permit him to probe the applicant's case on compensation. Those four steps had not been taken in the present case. Even assuming there was some evidence that there was behaviour by the employer which could amount to unreasonable conduct of the proceedings, it was impossible to conclude that a fair trial of the unfair dismissal complaint was not possible or was in any way inhibited by what had occurred. In those circumstances, it was not appropriate to delay the matter further, and the employment tribunal's decisions would be set aside and the unfair dismissal claim remitted for a hearing before a different tribunal.

Bolch v Chipman; 19 May 2003; EAT/1149 & 1150/02
EAT: Burton J (President), Mr J Hougham and Mr A D Tuffin

TRANSFER OF UNDERTAKING

An employment tribunal held that the second respondent, the transferor of a cleaning contract, had failed to consult with the applicant employee prior to the transfer, in breach of its duty under regulation 10 of the Transfer of Undertakings (Protection of Employment) Regulations 1981 and ordered it to pay compensation on the basis that liability had remained with the transferor rather than having passed on transfer to the second respondent, the transferee.

BURTON J (PRESIDENT), allowing an appeal by the transferor, said that the conclusion of the Employment Appeal Tribunal in *Transport & General Workers' Union v McKinnon, J R Haulage Ltd* [2001] ICR 1281 was that liability for a failure to consult did not transfer to a transferee under regulation 5(2) of the 1981 Regulations. The appeal tribunal in that case referred to *Kerry Foods v Creber Ltd* [2000] ICR 556 and distinguished it. But it was plain that the two decisions were inconsistent. The ordinary practice of the appeal tribunal, given that it was not bound by its own previous decisions, was that it had to find previous decisions of its own heavily persuasive, as uncertainty would be created if it easily departed from its earlier decisions. As a matter of ordinary precedent and practice, the tribunal below would follow the more recent of two inconsistent decisions of the appeal tribunal, provided it was clear that one or other of them was not per incuriam. *McKinnon* and *Kerry Foods* were inconsistent by virtue of a question of approach and a conception of policy. If one looked behind regulation 5 to Council Directive 2001/23/EC, it seemed difficult to see how an obligation of an employer to consult in relation to the potential transfer of a contract of employment was not an obligation "arising from an employment relationship existing on the date of transfer". What appeared to have motivated the appeal tribunal in *McKinnon* was a policy question which caused them to construe regulation 5(2) in order to achieve the best purpose of safeguarding an employee's rights. There was plainly an important balance to be reached. On the one hand it could be said that the best protection for an employee to ensure that he was consulted prior to a transfer was to ensure that the obligation was on and remained with the transferor. On the other hand it could be said that if there was a breach the best way of protecting the employee was to make sure that he was compensated, and, in the ordinary case, the best way was to ensure that the obligation transferred to a transferee who had the business and the assets and was likely to be solvent. Any securing of the position of the innocent transferee could ordinarily be done by its obtaining warranties from the transferor. The present case was allowed to proceed in the light of the two inconsistent decisions. Meanwhile, however, *Alamo Group (Europe) Ltd v Tucker* [2003] ICR 829 was decided by the Employment Appeal Tribunal, which carefully considered the two previous decisions and reviewed their inconsistencies, resolving the inconsistency firmly in favour of liability transferring under regulation 5(2). There was no reason to differ from that decision. For the purposes of certainty, it was right that people should know that, subject to any higher court considering the matter, the law was as stated in the *Alamo Group* and *Kerry Foods* cases and not as stated in *McKinnon*.

Blue Diamond Services Ltd v McNeish; 20 May 2003; EAT/1354/01
EAT: Burton J (President), Mr D Norman and Mrs R A Vickers

COMPENSATION

An employment tribunal held that the applicant had been unfairly dismissed as she was about to start maternity leave by reason of her pregnancy and awarded total compensation of £18,050, holding that, after the period of maternity leave, she had taken reasonable steps to find work and that she would have been able to return to equivalent earnings within a period of six months of the hearing.

JUDGE ANSELL, allowing an appeal against quantum by the employer, said that the employer submitted that, when awarding the applicant her past and future losses for the six-month period, the tribunal should have assessed the chances that she would not have returned to that job in any event and cited *Ministry of Defence v Cannock* [1994] ICR 918. There was nothing in the documentation from the tribunal to suggest whether that issue had been raised or whether they considered it. The tribunal also seemed not to have given consideration to *Polkey v A E Dayton Services Ltd* [1988] ICR 142. Though they found it to be a very serious case involving glaring omissions in terms of proper redundancy procedures, it still required a tribunal to go through the process of making assessment as to whether, if proper procedures had been adopted, the applicant would in fact have been selected. The employer should be allowed to raise such important principles, and when the matter was remitted to the tribunal they would have to consider them. The tribunal also appeared to have failed to discount childcare costs when making a comparison between that which the applicant would have earned if she had returned to work and that which she actually did earn. *Cannock* made clear that that was something a tribunal had to do. Also, there was a reference in the papers to a possibility that the applicant had applied for benefits but there was no formal recoupment order and the tribunal should consider that aspect of the matter. A further issue related to what was said to be double counting in respect of allowing loss of earnings from the point of dismissal and also awarding a sum for wrongful dismissal, in other words, failure to give proper notice. The appeal tribunal did not see any conflict in making those two awards. If payment in lieu of notice had been paid, the applicant could have gone out and found another job straight away. The final head of appeal related to the award for injury to feelings of £7,000. In the light of the guidance given in *Vento v Chief Constable of the West Yorkshire Police* [2003] ICR 318, there was no reason to interfere with the tribunal's award. The tribunal were entirely justified in regarding it as a serious case which would fall within the second *Vento* band. The case would be remitted for consideration of the issues identified. The applicant had put in a cross-appeal, but her solicitors appeared thereafter to have done precious little to pursue the matter, though at no stage had they actually withdrawn it, and they had not appeared on the appeal. The employer's solicitors had attempted to separate their costs referable entirely to the cross-appeal, and there would be an award of £350 against the applicant in respect of those costs.

S & B Car Hire Kent Ltd v Wallington; 28 August 2003; EAT/246/03
EAT: Judge Ansell, Mr B R Gibbs and Mrs R A Vickers

COSTS

Following the dismissal of their sex discrimination claims, the applicants were ordered by the employment tribunal to pay costs pursuant to rule 14(1) of the Employment Tribunals Rules of Procedure 2001 on the ground that the conduct of their representative in bringing the proceedings was misconceived.

LORD JOHNSTON, allowing an appeal by the applicants, said that it had to be recognised that rule 14(1) of the 2001 Rules of Procedure amended the previous rule, rule 12 of the Employment Tribunals Rules of Procedure 1993, by adding in the words "or a party's representative" and the phrase "or the bringing or conducting of the proceedings by a party has been misconceived". Thus there had been a fairly radical alteration to the previous rule, in respect of which a certain amount of case law had built up. It also had to be noted that in regulation 2(2) of the Employment Tribunals (Constitution and Rules of Procedure) (Scotland) Regulations 2001 "misconceived" was defined as including "having no reasonable prospect of success". The appeal tribunal did not consider that *Benyon v Scadden* [1999] IRLR 700 was relevant to the present issue as to the proper interpretation of the new rule 14 because of the change in wording. As a matter of statutory construction the insertion of the words "or a party's representative" had to have had a purpose in the mind of the draftsman, and, given the existence of *Benyon* which applied conduct of a representative to any aspect of the old rule, the intention was to restrict the issue of conduct of the representative to the only limb to which it was attached. In other words, it was relevant for a tribunal to consider how a party's representative had conducted the proceedings as part of the question whether the test established by the adverbs in the second branch of the rule [acting "vexatiously, abusively, disruptively or otherwise unreasonably"] had been met. It accordingly followed that it was not relevant to consider the conduct of a representative in relation to the third limb ["the bringing or conducting of the proceedings by a party has been misconceived"]. The proper test in that respect had to be, looking at the matter objectively, whether the applicant's case had any reasonable prospect of success, either at the time of conception or during the course of its currency. The phrase "or conducting of the proceedings" in the third limb raised a difficulty as a matter of construction, but, properly understood, it must be meant to embrace a notion that, even if a case had reasonable prospects of success at the start, it might develop in such a way that those prospects disappeared. Thus it was possible for the tribunal to consider the issue not only at the time of inception, but also during the currency of the case right up to its conclusion. The question was not directed to issues of fault or blame but simply imposed an objective assessment of all the circumstances of the case. If that approach was correct, it was plain that the employment tribunal misconstrued the test to be applied to the third limb, having not even addressed the issue of no reasonable prospects of success. It was not appropriate to remit the matter for further consideration, given that a decision had been reached, which might cause the tribunal to prejudge the issue if it was being reconsidered, and the decision on costs would be quashed.

Hosie v North Ayrshire Leisure Ltd; 2 October 2003; EATS/13/03
EAT(Sc): Lord Johnston, Miss S B Ayre and Miss A Martin

DISABILITY

An applicant complaining of disability discrimination, in answer to the question "what physical or mental impairment did she suffer from which she claims is the basis of her disability?", replied that she suffered from hypothyroidism and tinnitus. On a preliminary hearing to determine whether the applicant had a disability within the meaning of the Disability Discrimination Act 1995, the employment tribunal stated that the applicant had to establish that her symptoms were attributable to hypothyroidism, but that she had failed to produce sufficient evidence to satisfy them that that was the case, and they dismissed her complaint.

BURTON J (PRESIDENT), allowing an appeal by the applicant, said that the first question the tribunal ought to have addressed was not the cause of any impairment, but simply whether the applicant had an impairment. The applicant submitted that what she was saying was that she had an impairment, namely the physical symptoms of balance impairment, difficulty in climbing stairs, fatigue, etc, and that the tribunal should not have found it determinative of the question as to whether the applicant was disabled that they were satisfied that the symptoms of which she was complaining were not due to hypothyroidism. The appeal tribunal were satisfied that the employment tribunal had not asked or answered sufficient questions. Though, on the evidence before them, the tribunal were entitled to say that the symptoms were not due to hypothyroidism, they did not go on to answer the questions: (1) whether the applicant did have an impairment not caused by hypothyroidism, or (2) whether there was any deduced effect of the hypothyroidism. Simply to give the short answer that the tribunal did give, that the symptoms were not attributable to hypothyroidism, was not the same as saying that the applicant had no physical impairment. The issue of what the cause was of a physical impairment was always going to be of importance, and might lead to the conclusion, if there was no apparent cause, that the impairment was not genuinely a physical one but psychosomatic, or, possibly, to the question of whether there was any likely long term effect in the impairment, but it was not the same question, but a different and only an evidential one. It would be unfortunate if any conclusion to which the appeal tribunal came discouraged the need for an applicant to adduce medical evidence, because without medical evidence it was extremely unlikely that someone who simply asserted that he was having some physical difficulty or other would be able to establish, even if he could support prima facie the existence of some physical impairment, the other requirements of the Act. The matter would be remitted for further consideration by the same tribunal.

MacIver v Capita Business Services Ltd; 16 May 2003; EATS/65/02
EAT(Sc): Burton J (President), Mr A J Ramsden and Miss A Martin

EVIDENCE

An employment tribunal, hearing a complaint of unfair constructive dismissal, rejected an objection by the employers' representative to proposed evidence in chief by the employee alleging that the employers had committed fraud, which had led to his resignation.

BURTON J (PRESIDENT), allowing an interlocutory appeal by the employers against the ruling, said that the test of admissibility was whether the evidence to be given was relevant, but it had to be borne in mind that if evidence was given it would be given in public, there being no apparent availability of a restricted reporting order. Where there was an allegation of fraud or criminal conduct, it had to be proved, albeit on a civil basis, to a higher standard, and certainly had to be fully particularised. In that kind of area there was always, in an appropriate case, the question arising of privilege against self-incrimination, and any party had to be given an adequate opportunity to consider that aspect. Tribunals were subject not only to the ordinary principles of fair play well known to the civil courts, but also to considerations of article 6 of the European Convention on Human Rights. Finally, there was the obligation owed to the court as well as to the parties by advocates as a result of their professional codes of practice. That involved considerations of propriety in relation to the asking of questions. If an allegation was to be made of fraudulent conduct, for example, in cross-examination, clearly an advocate would not dream of putting a derogatory question without some kind of evidential basis in his possession for doing so. If there was no such basis, other than reasonable suspicion, it could be done by way of a straightforward question which did not expect the answer “Yes” or “No” and which certainly did not involve, in the framing of it, any allegation which made it look as though the advocate asking the question had any information to support it. If the advocate had information available, then in most cases it ought already to have been disclosed and ought, in any event, to be adduced at some stage so that it could be set against the answers to the question put and itself tested. That was the more important where the hearsay was strictly not inadmissible as in employment tribunals. Very new evidence, or at any rate new allegations, that had arisen justified the appeal tribunal interfering with the discretion of the employment tribunal, to the extent of concluding that the objection had been well founded, not necessarily as a matter of principle, but certainly on the basis that such questioning should not have proceeded without further appreciation of its legal, jurisprudential and evidential basis. To that extent the tribunal were premature in concluding that it was appropriate to allow the evidence to come out in chief, rather it would have been appropriate to inquire as to what the nature of the evidence would be and whether it could ever be admissible and, if so, what it was, then to make a decision as to the stage at which it would become admissible, if it would be ever so.

Sir Robert McAlpine Ltd v Telford; 13 May 2003; EATS/18/03
EAT(Sc): Burton J (President), Mr M R Sibbald and Mr R P Thomson

DATE OF TERMINATION

On Friday 13 September 2002 an employee faxed a letter to his employer's office, which was received on the fax machine there at 8.21 pm, by which he asserted a repudiatory breach by the employer of his contract of employment and accepted that repudiation "as a resignation, effective forthwith". An employment tribunal found that, although there was no evidence that the letter was read until some time in the following week, the effective date of the employee's dismissal was 13 September and his complaint of unfair dismissal, presented on 13 December 2002, was out of time.

JUDGE RICHARDSON, dismissing an appeal by the employee, said that the employee submitted that, where an employer committed a fundamental breach such that an employee was entitled to terminate his contract, the employee had to elect to terminate the contract and that such an election had to be communicated to the employer and was not effective until it was communicated. It was accepted that communication by fax would suffice for that purpose. The employer submitted that communication by fax outside office hours was sufficient. The appeal tribunal had concluded that the effective date of termination for the purposes of unfair dismissal would not necessarily be the date yielded by an analysis following classical principles of contract law. Often the two dates would be the same, but the scheme of the Employment Rights Act 1996 was in certain respects simpler and more straightforward. Subtle legalities had to take second place to what an employee would commonly understand. If the effective date of termination was the date on which the fax was received in the employer's office, a sensible result was achieved. The date was the date on which the employee, having made his election, communicated it in the clearest terms. As the employment tribunal found, he intended to resign with effect from that date, and no longer considered himself bound from that date. If receipt of the fax was insufficient to fix the date of termination, the employee could not with certainty know what date it was. It might have been as late as 16 September, when the office opened on the Monday. But if an authorised member of staff had read it on the Friday, Saturday or Sunday, the date would be earlier; so the employee could not sensibly rely on the date being later than 13 September. It would reflect the intention and purpose of the 1996 Act, and follow the approach of the Employment Appeal Tribunal in *Robert Cort & Son Ltd v Charman* [1981] ICR 816, to hold that where an employee communicated his immediate acceptance of a repudiation by fax, the effective date of termination was the date of receipt of the fax, not any later date when it was read or acted on.

Potter v R J Temple plc (in liquidation); 18 December 2003; EAT/478/03
EAT: Judge Richardson, Mr P Dawson and Ms N Sutcliffe

PARTIES

An applicant employee made complaints of unfair constructive dismissal, wrongful dismissal and unlawful deduction from wages, naming as the sole respondent the company by whom he had been employed as a director. When the complaints came before the employment tribunal, the company was not present or represented, and the tribunal upheld the applicant's claims. The tribunal formed the view that the company secretary and a co-director had taken concerted action to force the applicant out of the company and took "the unusual course" of making the award against the two individuals as well as the company. The two individuals were subsequently joined as respondents and a review hearing was held at which the tribunal confirmed its original decision, concluding that limiting liability to the corporate employer would be an unduly restrictive interpretation of section 112(4) of the Employment Rights Act 1996 and that on the facts as found the two individuals could not hide behind the corporate structure.

JUDGE PETER CLARK, allowing an appeal by the individual respondents, said that the question was whether the employment tribunal had power to make separate awards against the appellants as well as the company in respect of any or all of the successful claims brought by the applicant. The general statement of the law as to directors' liability in *Halsbury's Laws of England*, vol 7(1), para 616, was that creditors of a company have no remedy for breach of contract by the company against directors, save in cases whereby under the company's memorandum the directors' liability was unlimited; nor were directors liable in negligence save where particular circumstances existed. It was not open to the employment tribunal to find the appellants jointly and severally liable together with the corporate employer, it not being found that they were the applicant's employer. In the case of the claims under the Employment Rights Act 1996 it was absolutely plain that a complainant's redress was against the employer only. In the breach of contract claim, justiciable in the employment tribunal by virtue of section 3(2) of the Employment Tribunals Act 1996 and article 3 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994, the claim was in contract, the parties to the contract of employment were the applicant and the corporate employer, and his claim was against that employer only. The orders against the appellants would be set aside.

Mack v Allen; 20 November 2003; EAT/672 & 673/03
EAT: Judge Peter Clark, Mr D J Hodgkins and Mr S M Springer

PRACTICE

An employment tribunal gave extended reasons, for its decision to award an applicant employee the sum of £133,730 compensation for unfair dismissal and disability discrimination, which provided little or no explanation of the reasoning as to why a particular conclusion had been reached under each particular head of claim.

LORD JOHNSTON, on an appeal by the respondent employers, said that the employers argued that the employment tribunal had failed to satisfy the tests enunciated in *Meek v City of Birmingham District Council* [1987] IRLR 250 and *Tran v Greenwich Vietnam Community Project* [2002] ICR 1101 to the effect that in simple terms the parties had to know from the reasoning of the tribunal why they had won or lost. The appeal tribunal were entirely satisfied that the way the tribunal had approached the matter was wholly inadequate when it came to the issuing of reasons for the various heads of claim that it had allowed. The tribunal had more or less arrived at a conclusion and it was quite impossible to divine what particular aspects of the various arguments had found favour with it. The question arose as to what should be done. The appeal tribunal could allow the appeal and remit the matter to a freshly constituted tribunal to reconsider the whole question of remedy, as the employers urged, or go down the line which had been brought forward by the Court of Appeal in *English v Emery Reimbold & Strick Ltd* [2003] IRLR 710, 714, para 25: "If an application for permission to appeal on grounds of a lack of reasons is made to the appellate court and it appears to the appellate court that the application is well founded, it should consider adjourning the application and remitting the case to the trial judge with an invitation to provide additional reasons for his decision or, where appropriate, his reasons for a specific finding or findings. Where the appellate court is in doubt as to whether the reasons are adequate, it may be appropriate to direct that the application be adjourned to an oral hearing on notice to the respondent." While recognising that that was a personal injury case and that it was looking at the matter at the time of considering leave to appeal, the appeal tribunal did not consider either distinction was relevant in the present case. The employers argued that if that line was followed their position might be prejudiced in the context of a fair hearing because of the fact that there might be opportunity for re-argument or reconsideration contrary to their interests. That was a valid point, but, when weighed against the appalling prejudice that would be suffered by the employee if the matter had to be started again, there was no justifiable reason at the present stage not to follow the *English v Emery Reimbold & Strick Ltd* route. If after the exercise had been completed the employers felt that they had been prejudiced by the exercise, they would have the right reserved to them so to argue at a further hearing before the appeal tribunal. Accordingly, the appeal would be adjourned for the matter to be remitted to the same tribunal so the chairman might amplify, clarify and give reasons for each of the findings the tribunal made in respect of each head of claim.

Bax Global Ltd v French; 20 October 2003; EAT/596/03
EAT: Lord Johnston, Mrs M McArthur and Mr D Norman

PRACTICE

After the conclusion of the evidence in a race discrimination case, an employment tribunal directed the parties to supply brief written submissions to the tribunal by a specified date but there was no direction for their exchange. The parties sent their submissions to the tribunal without serving them on the other party, and the tribunal reached its decision, in favour of the employers, without the parties having had the opportunity to respond to their opponents' submissions.

JUDGE BIRTLES, dismissing an appeal by the applicant employee, said that in *Barking and Dagenham London Borough Council v Oguoko* [see Recent Points [1999] ICR Part 9] the Employment Appeal Tribunal held that failure by an employment tribunal to cross-serve final written submissions was a breach of the rules of natural justice and that such breach could be cured by subsequent action by the employment tribunal. In *Oguoko* the action taken by the tribunal on a review was to write to each party asking how their representations would have changed or been extended if submissions had been exchanged. Having received a response, the tribunal took the view that any further comments would have made no difference to its decision. In other words the breach was cured by the action of the tribunal. In the present case no application for a review had been made. It was not sufficient for a party to submit that there had been a breach of the rules of natural justice by an employment tribunal, whether by a failure to refer the parties to an authority on which it intended to rely or by a failure to cross-serve parties' written submissions and invite comments thereon. A technical breach of the rules of natural justice could not inevitably result in an appeal being allowed with the remission of the case for a full fresh hearing before another tribunal. The appeal tribunal agreed with, and applied, *Stanley Cole (Wainfleet) Ltd v Sheridan* [2003] ICR 1449 to the facts of the present case. In order to succeed in the appeal the appellant applicant needed to show that she had suffered something which was "seriously irregular and unfair" (per Ward LJ, at p 1458, para 28) or "substantial unfairness" (per Buxton LJ, at p 1462E, para 49). The applicant could only point to two matters she would have wished to comment on, and the appeal tribunal could find no serious irregularity or substantial unfairness in relation to either matter.

Mayo-Deman v Lewisham College; 8 December 2003; EAT/104/02
EAT: Judge Birtles, Mr P A L Parker and Mrs M T Prosser

APPEAL JURISDICTION

An employment tribunal awarded an employee compensation of £500 under section 11 of the Employment Relations Act 1999 for a breach by the employers of her right, in section 10 of the Act, to be accompanied at a disciplinary hearing.

JUDGE RICHARDSON, dismissing an appeal by the employers, said that section 10 of the 1999 Act introduced the right for a worker to be accompanied if he was required or invited by his employer to attend a disciplinary or grievance hearing. If the employer failed to comply with his duty under section 10, the employee could make a complaint to an employment tribunal under section 11, and if the employment tribunal found the complaint well-founded it had to order the employer to pay compensation not exceeding the modest sum of two weeks' pay. The employee had taken the point that the Employment Appeal Tribunal had no jurisdiction to hear the appeal. The appeal tribunal had limited jurisdiction, conferred by or under section 21 of the Employment Tribunals Act 1996. In regard to employment tribunals, its jurisdiction was conferred by section 21(1). As section 21(3) made clear, jurisdiction to hear such appeals might be conferred by other statutes; but it was plain from section 21 that the appeal tribunal did not have jurisdiction over employment tribunals unless there was a statutory provision conferring that jurisdiction. The list of proceedings in section 21(1) was defined by reference to the statute or regulation which conferred jurisdiction on employment tribunals to hear proceedings. The list was lengthy. The full range of an employment tribunal's daily work was covered; but the Employment Relations Act 1999 was not in the list. So section 21(1) did not confer jurisdiction to hear an appeal against a decision on a complaint under section 11 of the 1999 Act; nor did the 1999 Act itself; nor did any other statute. There was simply no jurisdiction to hear an appeal on a complaint under section 11. So extensive was the jurisdiction of the Employment Appeal Tribunal to hear appeals from employment tribunals that it was not surprising if practitioners overlooked that point. Moreover, there was a reported case of the Employment Appeal Tribunal under section 11: see *London Underground Ltd v Ferenc-Batchelor* [2003] ICR 656. Since the Employment Appeal Tribunal, though a superior court of record, was a court of limited statutory jurisdiction, no earlier mistake, agreement, order or failure to take the point could confer jurisdiction. It was the duty of the appeal tribunal to decline jurisdiction.

Refreshment Systems Ltd (trading as Northern Vending Services) v Wolstenholme; 27 October 2003; EAT/608/03

EAT: **Judge Richardson, Mr I Ezekiel and Ms J Drake**

COSTS

Following his dismissal in November 2002, an employee formally requested a written statement from his employer giving particulars of the reasons for dismissal, pursuant to section 92(1)(a) of the Employment Rights Act 1996. On 2 December 2002 the employer's solicitors refused to provide reasons, saying that the employer was not required to do so. On 15 January 2003 the employee presented an originating application, claiming a declaration based on his understanding of the real reason why he was dismissed. On 5 February 2003 the employer lodged its notice of appearance which did not set out any reason for dismissal or suggest that any was to be provided. Finally, on 26 March 2003 the employer's solicitors wrote setting out the reasons for dismissal. An employment tribunal chairman allowed an application by the employee for costs from 2 December 2002 (on the ground that the employer and its representatives had acted vexatiously and otherwise unreasonably), rejecting the employer's submission that he had no power to award costs prior to the commencement of proceedings.

JUDGE RICHARDSON, allowing an appeal by the employer, said that the employment tribunal's power to award costs, in rule 14 of the Employment Tribunals Rules of Procedure 2001, was founded on a finding as to the way a party had brought or conducted proceedings. The conduct of a party prior to proceedings or unrelated to proceedings could not found an award of costs. It was necessary for there to be a causal relationship between the conduct of a party in bringing or conducting proceedings and costs which were awarded under rule 14. It followed that the employment tribunal had no power to award costs against a party until the time the party had brought, or conducted, proceedings. The chairman had erred in law in awarding costs from 2 December 2002. An employment tribunal, having found fault in the conducting of proceedings, needed to examine carefully what loss was attributable to that conduct. It could make a broad assessment, but it could not backdate its award to include costs which were not attributable to that conduct. The employer's second line of submission was that its conduct in the course of the proceedings could not be characterised as vexatious or unreasonable. Concentrating on the period which began with the lodging of the notice of appearance, a notice of appearance was required to set out sufficient particulars to show on what grounds a party resisted the proceedings. The notice in the present case did not set out any case about the reason for the dismissal, nor say that it was intended to give a reason for dismissal. If it had done that, subsequent costs would have been avoided. It was not reasonable to file a notice of appearance which was effectively a holding notice in the hope of deflecting the need to comply with a statutory obligation. Once proceedings had begun, the time for prevarication was over. It was plainly unreasonable to continue to prevaricate. Therefore, the chairman's error in awarding costs prior to the notice of appearance did not invalidate his conclusion relating to the proceedings thereafter. The matter would be remitted for rehearing to establish the costs attributable to the employer's unreasonable conduct from the time of the notice of appearance. In so doing the chairman should have regard to principles of the kind set out in the Civil Procedure Rules.

Health Development Agency v Parish; 24 October 2003; EAT/543/03
EAT: Judge Richardson, Dr S R Corby and Mrs M V McArthur

EMPLOYEE

An employment tribunal held, as a preliminary issue, that an applicant was not an employee for the purposes of pursuing a complaint of unfair dismissal against the respondent company under the Employment Rights Act 1996. The applicant had entered into two fixed term agreements, one with three associated companies of the respondent company ("the advisory agreement") and one with the respondent company, on the same day. Both required the applicant to provide advice, assistance and support for two particular investment opportunities. The advisory agreement provided that he was to be paid a daily retainer and expenses and the other agreement had attached to it a document entitled "Terms and Conditions of Fixed Term Employment". The employment tribunal held that there was no enforceable contract between the parties, merely "a documentary trail which did no more than reiterate the obligations which the applicant was already under and being paid for pursuant to the advisory agreement". The Employment Appeal Tribunal allowed an appeal by the applicant and remitted the issue to be reheard.

MUMMERY LJ, dismissing an appeal by the respondent company, said that the appeal tribunal had pointed out that the employment tribunal did not hold that the "employment document" was a sham and it spelt out a large number of terms and conditions which were consistent with a contract of employment, even though they did not include provisions as to remuneration. His Lordship could not be persuaded that the poorly reasoned decision of the employment tribunal could stand. The decision that there was no contract between the company and the applicant failed properly to address the obvious fact, which was central to the determination of the applicant's relationship with the company, that the two contemporaneous agreements made between the related parties needed to be read together. The combined effect of the documents had to be ascertained by construing their provisions in the context of all the surrounding circumstances. The employment tribunal had erred in law in failing to conduct that exercise.

MAY and **PILL LJJ** concurred.

Emerging Markets Partnership (Europe) Ltd v Bachnak; [2003] EWCA Civ 1876
CA: Pill, Mummery and May LJJ; 19 December 2003

PRACTICE

An employment tribunal chairman refused applications by the respondent to a complaint of unfair dismissal (1) to postpone the hearing of the complaint, and (2) to hold a preliminary hearing into a claim that matters within the originating application were privileged.

JUDGE McMULLEN QC, dismissing an appeal by the respondent against the refusal to postpone and allowing an appeal by the respondent against the refusal to hold a preliminary hearing, said that the chairman gave as the reason for refusing to postpone the hearing that "the inconvenience to the respondent is not a sufficient reason". The respondent contended that that contained an inadequate statement of reasons. An order involving a simple matter such as listing was not a decision requiring extended or summary reasons. The chairman had given a reason, aptly summarised as rejecting inconvenience to the respondent as a sufficient ground. In a case where both parties were represented and had put in written submissions on an interim application, one could infer by the rejection of one party's view that the successful party's view had been upheld. The respondent's second argument was that the chairman did not consider the overriding objective in regulation 10 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2001. It was not necessary for every order and every decision in the employment tribunal to cite regulation 10, and the balancing factors set out in the chairman's order indicated that he had the overriding objective fully in mind, for it was said: "A chairman of tribunal has considered carefully what you say and has balanced that against the desirability of bringing this case to a hearing without delay." That was a straightforward recognition of the duty of an employment tribunal to pay attention to the overriding objective. Turning to the preliminary point on privilege, *Independent Research Services Ltd v Catterall* [1993] ICR 1, 5, indicated that where an issue arose as to without prejudice material it ought to be dealt with by a body that was not going to deal with the ultimate adjudication. An issue such as privilege should properly be taken, if it could, as a preliminary point for the reasons given in that case. That would ensure that there would be no contamination of a subsequent tribunal by its having heard the material. Sometimes the issue arose in a hearing and the judge or tribunal had to deal with it, but when the issue arose in advance it was practicable and desirable to have it considered by a chairman alone or by a tribunal who, if they ruled the material out, would not be called on to decide the substantive issue. The chairman erred in not allocating the privilege claim to a preliminary hearing. Accordingly, the order for there to be a hearing would stand but it would be concerned with whether to strike out the matters relying on what was said to be privileged. Responding to a request for some guidance to parties making interim applications to an employment tribunal, it seemed that, when both parties were anxious to have interim decisions made quickly, any application should be lodged with the tribunal and served on the other side, both as a matter of practicality and as a matter of transparent justice. That would cut down time and comply with the duty of parties to enable the tribunal to carry out the overriding objective. A simple way of achieving that, and a good practice, would be to indicate on the face of a document that it was being copied to others and for copies to be sent.

Jonathan Bailey Associates (UK) Ltd v Shapland; 10 December 2003; EAT/957 & 958/03
EAT: Judge McMullen QC

REMUNERATION

On an employee's reference, pursuant to section 11 of the Employment Rights Act 1996, for a determination of what particulars ought to have been included in his particulars of employment, following a transfer of his employment to the respondent transferee, the employment tribunal held that a share ownership scheme operated by the transferor, whereby sums were deducted from employees' salaries and paid into a trust fund to which the transferor also contributed and from which employees had an option to buy shares at a discount, was not "remuneration" for the purposes of section 1(4)(a) and did not form part of his conditions of employment on transfer.

JUDGE ANSELL, dismissing an appeal by the employee, said that in *Keiller v Lothian, Borders & Angus Co-operative Society Ltd* (unreported) 25 September 2002 the Employment Appeal Tribunal in Scotland held that the employment tribunal had been correct to dismiss an employee's claim for a declaration that benefits under an employer's "sharesave" scheme were to be regarded as remuneration within the terms of section 1 of the 1996 Act. Lord Johnston said: "It is the self-evident starting point in considering what constitutes employees' remuneration in the context of employment that the money in question must stem or flow from the employer." On the facts of that case there was no evidence that the employer made any contribution either to the discounted share price or to the bonus which was added to the moneys paid in by the employee, and the employee in the present case sought to distinguish it on the ground that in his case there was evidence that the employer did make a contribution, albeit indirectly and through the trust fund, to the operation of the scheme. The employers made the point that any payments that could be regarded as profit in the hands of the employee, i e the share discount and the bonus, were made by the trust fund to the particular employee, even though the employer might have made some contribution to the general operation of the fund. The respondent then relied on the definition of remuneration in section 1(4) of the Act, and made the points that paragraph (b) clearly contemplated it was something paid by the employer on a regular basis; that paragraph (k)(ii) also contemplated it as something that was paid by the employer; that paragraph (k)(iii) drew a distinction between remuneration and benefits; and that section 2(4), in requiring particulars falling within section 1(4)(a) to be included in a single document, clearly indicated that Parliament did not contemplate that section 1(4)(a) required an employer to declare the detailed rights and obligations under or in connection with a scheme such as the present since it would not be practicable to provide the relevant particulars in a single document. In terms of case law, the respondent argued that the scheme did not fall within the definition of remuneration in *S & U Stores Ltd v Wilkes* [1974] ICR 645, since it was not a sum which was paid by way of wages or salary, nor was it reimbursement of amounts incurred by an employee which contained a profit element and they argued the scheme was no more than a benefit in kind. The appeal tribunal could find no fault in the employment tribunal's conclusions. There were no regular or periodic sums being paid by the transferor to or for the benefit of this particular employee such as to create a profit in his hands which flowed directly from his employer. Any profit or benefit he received would come from the trust fund, the employer making no direct financial contribution to the employee's particular fund.

Jones v Liberata Life Pensions Investments Ltd; 6 February 2004; EAT/897/03
EAT: Judge Ansell, Mr P Dawson and Mr T Stanworth

REVIEW APPLICATION

An employment tribunal chairman refused to review an order, whereby an employee's originating application had been struck out because of his failure to comply with an interlocutory order to give disclosure and serve a schedule of loss, on the ground that there had been a failure to comply with the order without any explanation for the failure being provided and the application, therefore, had no reasonable prospect of success.

RIMER J, allowing an appeal by the employee, said that there was no basis on which the striking out order could be criticised. An unexplained failure to comply with orders such as those made in the present case was on the face of it unreasonable conduct which might deserve an appropriate sanction, including striking out the application. The tribunal had gone through the procedure specified in rule 4(8) of the Employment Tribunals Rules of Procedure 2001 but had received no response to its second warning letter. On the refusal to review, the employee's submission was that his request to review the striking out order was in substance a request to be given the opportunity of arguing that he should be relieved from the sanction imposed by that order; and that, in dealing with that request, the chairman should therefore have had regard to the considerations set out in paragraphs (a) to (i) of CPR, r 3.9. It was said that the chairman had focused on merely one of those factors, which she had regarded as by itself fatal to any hope of success on a review, and there was no basis for a conclusion that she also took into account, in particular, the matters referred to in paragraphs (a), (g), (h) and (i). The employee's submission depended on the proposition that the chairman ought to have had regard to the r 3.9 factors as material to the exercise she was performing. It was said that, although that rule was not expressly incorporated into the 2001 Rules, the tribunal's duty to have regard to the overriding objective in regulation 10 necessarily required it to treat the approach identified in r 3.9 as analogously applicable to the way an employment tribunal should approach a like question. In principle, it was correct that, in dealing with the application before her, the chairman ought to have had regard to the r 3.9 factors. She should have asked herself whether, taking them all into account, the employee had a reasonable prospect of persuading the tribunal on an inter partes hearing that he should be relieved from the finality of the striking out order. That conclusion was not reached on the basis that r 3.9 was to be regarded as impliedly incorporated into the Rules, which it was not, but assistance was derived from not only *Goldman Sachs Services Ltd v Montali* [2002] ICR 1251, but also *National Grid Co plc v Virdee* [1992] IRLR 555. As Judge Peter Clark said in *Goldman Sachs*, at p 1256, employment tribunals had now to exercise their powers under the Rules in accordance with the same principles that applied under the CPR. Accordingly, the chairman had misdirected herself in the manner in which she disposed of the request for a review. She had regard, in effect, to just one of the r 3.9 factors; and, though that was a very important one, it did not follow that by itself it was inevitably fatal to the success of a review. Another important consideration was that the employee had provided both the discovery and the loss schedule two days after the striking out order and, if relief were to have been granted promptly, the hearing date could probably still have been kept. The employee could at least be said to have a reasonable, or realistic—meaning better than fanciful—chance of success on a review hearing, and therefore there would be a direction for a hearing by the employment tribunal of his application for a review of the striking out order.

Maresca v Motor Insurance Repair Research Centre; EAT/752/03
EAT: Rimer J (sitting alone); 6 February 2004

WRONGFUL DISMISSAL

An employee, who was summarily dismissed 33 days short of completing the one-year qualifying period for the right to claim unfair dismissal, brought a successful complaint of wrongful dismissal in the employment tribunal. She was awarded damages comprising the pay she would have received during her three-month contractual notice period and, additionally, a sum representing the award she would have received, had she been able to bring a claim for unfair dismissal. The Employment Appeal Tribunal allowed an appeal by the employer against the latter part of the award.

BROOKE LJ, dismissing an appeal by the employee, said that Parliament had expressly legislated to the effect that an employee dismissed without the statutory period of notice attributable to his employment was deemed to have an effective date of termination of employment at the end of the statutory notice period: see now section 97(2) of the Employment Rights Act 1996. The complication in the present case lay in the fact that, whereas the employee's statutory period of notice was only seven days, she had a contractual entitlement to three months' notice. In *Johnson v Unisys Ltd* [2001] ICR 480 the House of Lords held that the existence of a statutory remedy for unfair dismissal precluded the development of a common law obligation on an employer to exercise a power of dismissal in good faith. In the present case the Employment Appeal Tribunal held that that decision precluded them from upholding the employment tribunal's additional award, saying: "Quite simply, the employee is seeking to circumvent the restrictions and limits which Parliament has imposed on compensation for unfair dismissal. That is impermissible." His Lordship could not fault the reasoning of the appeal tribunal. It was not open to the courts, through the machinery of an award of damages for wrongful dismissal, to rewrite Parliament's scheme and to place a financial burden on employers which Parliament had decided not to impose on them. To take any other course would be to expose courts and tribunals to something akin to the chaos which Lord Millett in *Johnson v Unisys Ltd*, para 80, feared. Everyone was now familiar with the statutory scheme for claiming compensation for unfair dismissal. The effective date of termination could generally be identified without too much difficulty, and, provided that it fell at a time when the employee had attained the statutory right not to be unfairly dismissed, then an application could be made to an employment tribunal, subject to the strict time limit. If the employee's submission were well-founded, a wrongfully dismissed employee whose effective date of termination pre-dated the end of their first year of employment would have the benefit of a much longer limitation period in which to make a claim that the dismissal deprived them of the chance of continuing in employment for a longer period and then making a claim for unfair dismissal. In the present case that claim could not be based on the actual facts of the employee's dismissal because by statute she had no right to claim compensation for unfair dismissal in respect of that dismissal. Instead, the court would have to speculate about the chances of her being unfairly dismissed on some hypothetical occasion after her statutory right had accrued. That would be a very unsatisfactory way of proceeding.

CHADWICK LJ delivered a concurring judgment, and SCOTT BAKER LJ agreed.

Virgin Net Ltd v Harper; 10 March 2004; [2004] EWCA Civ 271
CA: Brooke, Chadwick and Scott Baker LJJ

[2004] ICR Part 6

BREACH OF CONTRACT

An employment tribunal held that it had no jurisdiction to consider a respondent employer's counterclaim, for losses incurred as a result of the alleged breach by the applicant employee of the implied term that he would take reasonable care in the performance of his duties during his employment, on the ground that the claim was not outstanding on the termination of the employee's employment as required by article 4 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994.

JUDGE WILKIE QC, allowing a cross-appeal by the employer, said that the purpose of the 1994 Order was to enable an employment tribunal to deal with both a claim of unfair dismissal and a claim for damages for breach of the same contract of employment. The right for an employee to bring a claim was not subject to any special restriction. By contrast the employer's ability to bring a claim was limited to cases where the employee had already brought a contractual claim pursuant to the Order. In *Hendricks v Lewden Metal Products Ltd* (unreported) 11 March 1996 the Employment Appeal Tribunal said that the words "the claim . . . is outstanding on the termination of the employment of the employee against whom it is made" in article 4(d) of the Order limited claims to those already made but remaining unresolved at the time of the termination of the employment. Were that correct, it would seriously impact on the achievement of the purpose of the Order which was to avoid duality of proceedings. The meaning of "outstanding" could not be limited to claims which had already been made but had not yet been resolved. The normal meaning of "outstanding" was "unresolved, unsettled, unpaid, remaining owing, and/or due". None of those had as a condition that a claim had already been made. The appeal tribunal agreed with the view of the Employment Appeal Tribunal in *Mitie Lindsay Ltd v Lynch* (unreported) 6 October 2003, which endorsed the reasoning in the *IDS Handbook*, p 18: "Despite . . . *Hendricks* there is in fact nothing . . . which states that an employee has to have raised a matter with his or her employer during the currency of the employment in order for it to be classed as outstanding when the employment ends." The employment tribunal had erred in accepting submissions based on *Hendricks* that it did not have jurisdiction to consider the employer's complaints of breach of contract on the ground that no such claim had been made prior to the termination of the employment. The claims remained outstanding at the time of termination and the tribunal did have jurisdiction to entertain them.

Perrie v Mertrux Ltd; 28 January 2004; EAT/736/03
EAT: Judge Wilkie QC, Mr C Edwards and Mr S Yeboah

PRACTICE

At the end of an employee's case of unfair constructive dismissal, the tribunal chairman asked the respondent employer's solicitor whether she intended to make any submissions. She replied that she did not and presented the employer's case. At the conclusion of the hearing the tribunal reserved its decision and ordered written submissions to be exchanged. At the subsequent request of the employee, the tribunal permitted her to submit further submissions in reply to the employer's final submissions and, subsequently, extended the time for so doing. The employee also wrote to the tribunal inviting them to recuse themselves in the light of the question that had been addressed to the employer's solicitor. The tribunal chairman considered that application and refused it on the ground that in the interests of justice and in accordance with the overriding objective there should be finality in concluding the case. The tribunal dismissed the employee's claim.

BURTON J (PRESIDENT), dismissing appeals by the employee at an ex parte preliminary hearing, said that there was no appeal against the substantive decision. The first appeal related to the order for written submissions. The employee had wanted to have the last say. The result had been that the tribunal had varied the direction and, as one would expect by way of the kind of flexibility of case management which tribunals operated, when the employee had asked for time she obtained it and suffered no prejudice. The employee argued that the order was wrong in principle because there was a fundamental right of the person carrying the onus to make their submissions last. It was the case in general terms that when oral submissions were made the person who carried the onus had the last word. But that situation had been overtaken by the more modern system of written submissions, with no stipulation as to the order in which anything was to be read. It was not unusual for there to be a mop-up exercise with final responses or corrections and it was sensible for that to be done by way of exchange. There was no point of principle involved. The second appeal related to the question put to the employer's solicitor. There was only one context for such a question: that the tribunal was of the view that the employee's case was not a strong one and the tribunal was implicitly inquiring whether a submission of no case was to be made. The employment tribunal was entitled, albeit in an exceptional case, to dismiss a case at half-time if an application to that effect was made. It had been emphasised in the Court of Appeal that that was a rare power, and certainly would not be appropriate where the onus did not lie on the party going first. In fact no such application was made in the present case, and no expression of opinion was made by the tribunal.

Cases cited by the employee, which emphasised the importance of the absence of bias, were helpful in indicating a line that could be drawn. The appeal tribunal were entirely satisfied, with the benefit of that guidance, that the present was not a case in which a concluded, pre-judged view was put forward by the tribunal. There was no arguable case of apparent bias. The employee then submitted that the chairman ought not to have taken the decision not to recuse alone. The basis on which the chairman seemed to have taken the view that he could and should make that decision was one of proportionality and cost saving. The right course would have been for the chairman to have consulted the members by telephone, fax or email, so that there could have been an input from them in the making of a decision. The decision was not one the chairman had no jurisdiction to make but was one that ought to have been made by all three members. The appeal tribunal was, however, satisfied that the decision would have been the same if taken by all three together. There was no ground for the tribunal to recuse itself because there was no apparent bias.

Hudson v Testway Housing Ltd; 9 March 2004; EAT/825 & 826/03
EAT: Burton J (President), Dr S R Corby and Mr J Hougham

REPUDIATION

The defendant became the resident porter at a block of flats in 1993, appointed by the then managing agents. The claimant took an assignment of the headlease in March 2002, and, in 2003, gave the defendant a letter of dismissal with four weeks' notice, expiring on 25 March 2003, instead of his statutory entitlement to nine weeks. After 25 March the defendant continued to occupy the flat and perform porterage duties. In December 2003 the underlessees formed a management company to take over the management from 11 April 2004 and proposed to employ and accommodate the defendant. The claimant was granted a possession order in the county court.

MAURICE KAY LJ, allowing an appeal by the defendant, said that the judge held that the claimant had become the defendant's employer when it had taken an assignment of the headlease. It was a fundamental principle of the law of contract that a repudiatory breach did not of itself terminate a contract. It was the acceptance of the repudiatory breach, as such, by the innocent party which brought about termination. That doctrine applied to contracts of personal service as it applied to the generality of contracts. In the real world of employment there was usually no room for debate about whether an employer's repudiation had been accepted by the employee. In most cases it was self-evident, and often a matter about which the employee had no real choice. The defendant submitted that the present was an exceptional case because of the fact that he continued to perform the same tasks after 25 March 2003 as he had been performing before, and, of course, continued to live in the flat. It was apparent that the trial had been conducted on both sides on that assumption. At trial it was the claimant that was asserting that the contract of employment had come to an end on 25 March. Thus, it was for the claimant to prove that its repudiation had been accepted by the defendant. The judge fell into error by failing to approach the case on that basis. To the extent that there was a gap in the evidence, he allowed it to operate against the defendant. While acceptance might be easily inferred in most cases, the evidence in the present case, and the unusual factual matrix, did not support, or at the very least might not have supported, such an inference. It was not obvious that the judge had in fact drawn such an inference. What he seemed to have done, erroneously, was to have held against the defendant a failure to prove that he had not accepted the repudiation. If there was an evidential lacuna about acceptance, it ought to have benefited the defendant rather that the claimant. The order for possession could not stand. Such an order could only be founded on the termination of employment having occurred as the claimant alleged.

JONATHAN PARKER LJ agreed.

Beazer Investments Ltd v Soares; 26 March 2004; [2004] EWCA Civ 482
CA: Jonathan Parker and Maurice Kay LJJ

TRADE UNION ACTIVITIES

An employee was moved from the site where he normally worked to a less congenial site, losing his supervisor status, when the client of his employer at whose site he worked, required the employer to move him, alleging that he had attempted to recruit their staff into the union of which he was a branch secretary. On his complaint under section 146(1)(b) of the Trade Union and Labour Relations (Consolidation) Act 1992, an employment tribunal found that, although no complaint was, or could be, made of the employee's conduct, his complaint failed because his employer's purpose in moving him was to retain the contract with its client, despite the detriment to the employee, and was not to deter or prevent or penalise him on grounds related to trade union activities.

JUDGE RICHARDSON, dismissing an appeal by the employee, said that the purpose to which section 146(1) referred was the purpose of the employer, and the employment tribunal had rightly concentrated on the employer's purpose. In *Department of Transport v Gallacher* [1994] ICR 967 Neill LJ observed that the crucial issue in that case was the employer's criticism that the tribunal did not distinguish between effect and purpose and emphasised that it was important to adhere strictly to the words of the statute, saying: "in this context 'for the purpose of' connotes an object which the employer desires or seeks to achieve." In the present case the employment tribunal did not fall into error. It expressly found that it was not the employer's purpose to prevent or deter the employee from his union activities but to retain the contract with the client. It found that the employer's purpose was different from that of its client. Even if the effect or consequence of what the employer did was to prevent or deter union activities by the employee, it did not follow that that was its purpose. That conclusion was consistent with section 150, which applied only to a complaint under section 146(1)(c) and which in subsection (3) provided that a tribunal might order compensation to be paid by the person joined (pursuant to subsection (1)) instead of by the employer. The present case illustrated the limits on the protection provided by section 146. It might be thought desirable that a provision along the lines of section 150 should be available to allow the joinder of those who brought pressure on employers, whether or not the pressure related to industrial action. But it was to be observed that the Act placed the burden on the employer to prove the purpose for which he acted or omitted to act, if he had thereby subjected an employee to a detriment: section 148(1). An employer who used third party pressure as a pretext for his own purposes or who worked hand in glove with a third party in order to prevent or deter union membership or activities would find section 148(1) to be an obstacle. An employment tribunal was entitled to scrutinise the true purpose of acts or deliberate omissions which had the effect of preventing or deterring union membership or activities.

Smyth-Britt v Chubb Security Personnel; 21 November 2003; EAT/620/03
EAT: Judge Richardson, Mr P Gammon and Ms P Tatlow

CONSTRUCTIVE DISMISSAL

An employment tribunal dismissed an applicant employee's complaint of unfair constructive dismissal on the ground that, even if there were sufficient breaches of the implied term of trust and confidence for the applicant to be entitled to resign, the act relied on as the "last straw" and which led him to resign was reasonable conduct by the employers.

JUDGE PROPHET, allowing an appeal by the applicant, said that, in situations which involved a series of actions by the employer, it was necessary for the employment tribunal to look at the earlier matters, plus the final act, in order to decide whether cumulatively they constituted a fundamental breach of contract entitling the employee to resign and claim a constructive dismissal. Where the employee was claiming a series of acts culminating in an act alleged to be a final straw, the important case was *Lewis v Motorworld Garages Ltd* [1986] ICR 157. There it was emphasised by the Court of Appeal that, if there was a final act by the employer which caused the employee to resign, it was not essential for that final act itself to constitute a breach of contract. The employment tribunal indicated in their reasons that, because the final act, which caused the applicant to resign, was not a breach of contract, but fully in accordance with the terms of his contract, there could be no constructive dismissal. They also added that the action of the employers was a reasonable one. The employers submitted that, in order to constitute a "last straw", the conduct of the employer had to be unreasonable in some way, and that the tribunal had expressly found that the employers' actions in respect of non payment of wages had been reasonable. The difficulty about that argument was that in all "last straw" situations matters turned to some extent on the perception of the employee at the time he felt that he had been treated unreasonably or unfairly by his employer. It was that that caused him to decide to resign, bringing into the picture previous actions by the employer about which he had complained. It would be wrong to say that any possibility of a finding of constructive dismissal in such a situation was negatived if the final action of the employer was subsequently found by the employment tribunal to have been reasonable. The case law indicated that the function of the employment tribunal when faced with a series of actions by the employer was to look at *all* the matters and assess whether cumulatively there had been a fundamental breach of contract by the employer. The appeal tribunal was unable to find the answer to that question in the reasons of the employment tribunal in the present case. It would not be appropriate for the appeal tribunal to substitute a decision on the matter of whether the applicant was or was not constructively dismissed, nor would it be proportionate for the matter to be remitted to a different tribunal. The case would, therefore, be remitted to the same employment tribunal for it to answer the question whether the previous acts of the employers, together with the final act, *cumulatively* constituted a fundamental breach of the applicant's contract of employment. Permission to appeal granted.

Omilaju v Waltham Forest London Borough Council; 31 March 2004; EAT/941/03
EAT: Judge Prophet, Mr J C Shrigley and Mr D Welch

PRACTICE

A doctor brought complaints of direct and indirect race discrimination against, inter alia, three co-operatives, formed to enable doctors to deal with the out of hours requirements of patients, on the ground that the policy adopted by the co-operatives, the membership qualification for which was limited in such a way geographically that it excluded the applicant's practice from membership, had a racially discriminatory effect. The employment tribunal rejected the claims of indirect discrimination and rejected the claim of direct discrimination against two co-operatives but upheld it against a third.

BURTON J (PRESIDENT), allowing an appeal by the co-operative, said that the decision of the employment tribunal was 54 pages long and there were no paragraph numbers. That was the practice of most employment chairmen in Scotland, but not in England. Its significance in relation to a lengthy decision, such as the present, was that, without paragraph numbers, the parties found it far more difficult to identify those parts of the decision in their notice of appeal or skeleton argument to which particular attention was drawn. The appeal tribunal, therefore, asked that in future chairmen enabled the clear perception of their decisions to be carried out by reference to paragraph numbers. The appeal tribunal also urged that there be not the practice, quite frequent in England when using paragraph numbers, of running into massive numbers of sub-paragraphs and sub-sub-paragraphs. That not only led to a lack of understanding of where one had reached in a decision, but also very often to some scrabbling around in lengthy decisions to discover of what paragraph some sub-sub-paragraph formed part. Chairmen were, therefore, urged to adopt consecutive paragraph numbering; and where it was helpful if particular paragraphs were broken up into sub-paragraphs, which should not happen on any kind of protracted basis, they should be enumerated by using the numbering 12.1, 12.2, etc for the duration of the relevant paragraph. The nub of the case itself was that in relation to the policy of the appellant co-operative of limiting the geographical ambit of the co-operative and excluding the applicant's practice there was direct discrimination, because the explanations given by the co-operative for that basis of exclusion was unjustifiable: not because it was indirectly discriminatory but because it was directly discriminatory. The tribunal did not recite the explanations which were in fact given in some detail by the co-operative. Whether or not they were good, if they were to be rejected by the tribunal because they were not a sufficient explanation for the exclusion of the applicant's practice, there was required to be such a finding by the tribunal. But the tribunal did not explain why it rejected the reasoning of the co-operative; and, even apart from the inadequacy of its dealing with that issue, the tribunal certainly did not deal with the consequence of that conclusion and why it came to the view that the only available inference was that the reason why the co-operative rejected the approaches of the particular practice was on racial grounds. The tribunal erred in law in its approach and the decision could not stand. The matter would be remitted to a different employment tribunal for the issue of race discrimination to be reheard.

Kirkcaldy Out of Hours GP Co-operative v Goyal; 27 April 2004; EATS/83/03
EAT(Sc): Burton J (President), Miss S B Ayre and Miss A Martin

REDUNDANCY

On 29 July 2002 an employee entered into a four-week trial period in another job when his existing position became redundant. Before the expiry of the trial period he wrote a letter to the employers saying that the new position did not suit him and that he wished to apply for redundancy, as a result of which the employers met with the employee and there was an agreement to extend the trial period. Within the extended trial period, but outside the original four-week period, the employee wrote a further letter saying that he would be leaving on 31 October 2002. An employment tribunal found that the employee's first letter was intended to terminate his new employment and that he was entitled to a redundancy payment.

BURTON J (PRESIDENT), allowing an appeal by the employers, said that it was clear from section 138 of the Employment Rights Act 1996 that an employee who did not in fact leave on becoming redundant was only entitled to qualify for a redundancy payment by way of a statutory extension to his entitlement if he either terminated the contract during the trial period or gave notice to terminate during that period and the contract terminated as a consequence of that notice. The only circumstance in which the trial period of four weeks could be extended was where an extension was agreed for the purpose of retraining the employee in accordance with section 138(6), and in the present case there had been no extension of the trial period by virtue of that subsection. The issue on the appeal was whether as a matter of law the employment tribunal had been entitled to construe the employee's first letter as bringing him within the provisions of section 138(2)(b)(i). The tribunal did not refer to either *Morton Sundour Fabrics Ltd v Shaw* (1966) 2 ITR 84 (in the Divisional Court) or *Burton Group Ltd v Smith* [1977] IRLR 351 (in the Employment Appeal Tribunal), both of which were binding on them. *Morton Sundour* was authority for the proposition that in order to determine a contract of employment an employer had to specify when the termination was to occur, or at least to make it possible for that to be ascertained; and that was followed and adopted in the *Burton Group* case. Both cases concentrated on dicta emphasising that a notice by an employer could not be effective without a termination date. The same clearly applied to a notice to terminate given by an employee. If it were the case that a letter such as the present employee's first letter, which clearly expressed a wish to apply for redundancy, was a notice to terminate, the consequence would be extremely detrimental to the interests of many employees who might send such letters, expressing an interest in a redundancy scheme but not intending in any way to resign, since it would give the employer the opportunity to accept as a resignation letter something that was nothing of the kind. It was quire plain that, absent some special argument, the employee's letter was not a notice to terminate and should not have been so construed. It was argued for the employee that section 138(2)(b)(i) should be construed in a way different from the law of ordinary contract, and that the words "gives notice to terminate" should be read more broadly so as to include "gives notice of an intention to terminate at some stage in the future". The appeal tribunal were wholly unpersuaded that section 138(2)(b)(i) should be construed in that way. Section 138 allowed for a very limited extension of the right to a redundancy payment which otherwise accrued on termination of the original employment. The applicant was not entitled to a statutory redundancy payment.

Reality (White Arrow Express) Ltd v O'Hara; 18 November 2003; EAT/447/03
EAT: Burton J (President), Ms B Switzer and Mr B M Warman

TIME LIMIT

Claims by a trainee solicitor against her employers of sex discrimination and unfair dismissal were settled by a COT3 form signed on 18 April 2002. On 2 May 2002 the employee received from the Law Society a copy of a letter dated 22 March 2002 from the employers to the Law Society informing them that the employee's training contract had been terminated. On 9 July 2002, relying on her solicitor's advice that the three-month period for presenting a complaint ran from 2 May, the employee made a complaint that the writing of the letter of 22 March to the Law Society was an act of victimisation, contrary to the Sex

Discrimination Act 1975, by the employers. An employment tribunal held that the complaint was out of time and refused to extend time under section 76(5) of the Act.

JUDGE McMULLEN QC, allowing an appeal by the employee, said that, in exercising its discretion whether or not to extend time, the employment tribunal had erred in leaving out of account the employee's contention that she had been awaiting notification from the Office for the Supervision of Solicitors as to the outcome of a complaint relating to the termination of her training contract. Generally speaking, waiting for an internal procedure to be exhausted was not sufficient grounds for postponing the filing of a claim; however, in the regulated regime of solicitors' contracts the situation might well be different. Secondly, the tribunal had plainly visited the fault of the employee's solicitor upon her. Although in the Employment Appeal Tribunal a fault by a legal adviser in failing to lodge an appeal in time was not generally grounds for the exercise of discretion to extend time, the position seemed to be different at first instance where different considerations applied. In *Hawkins v Ball* [1996] IRLR 258 Keene J held that a tribunal did not err in paying attention to that factor. A tribunal ought to consider the check list under the Limitation Act, suitably modified for the purposes of an employment tribunal claim, as Smith J did in *British Coal Corpn v Keeble* [1997] IRLR 336, but would not fall into error unless it omitted a significant factor. Where the issue turned on the steps taken by an applicant to obtain and act on legal advice, *Steeds v Peverel Management Services Ltd* [2001] EWCA Civ 419 indicated that wrong advice, or the existence of an implied case against negligent solicitors, ought not defeat an applicant's contention that the claim ought to be heard. Inextricably linked to the taking of advice was the concept that the party was not relying on his or her own or actual or imputed knowledge. A trainee solicitor experienced in employment matters was entitled to entrust litigation to another experienced solicitor and to rely on her advice. The concession that the cause of action arose on 22 March 2002 was not easy to make. The concept of a crystallised right, as understood in *Clarke v Hampshire Electro-Plating Co Ltd* [1992] ICR 312, was not always easy to pin down and a trainee solicitor should not be condemned in an exercise of discretion for getting it wrong (with her solicitor). For those reasons, the employment tribunal erred in its application of the law to the exercise of its discretion when it refused to hear the employee's complaint. The case would be remitted for a hearing on the merits of the employee's victimisation claim.

Chohan v Derby Law Centre; 7 April 2004; EAT/851/03
EAT: Judge McMullen QC, Mrs L Tinsley and Mrs R A Vickers

AMENDMENT

An employee's originating application gave "the type of complaint" as "constructive dismissal" and stated in box 11 that the manager at the care home where he worked had waged a vendetta against him which "included bullying, harassment, two physical assaults, one sexual assault". At the start of the hearing the chairman considered that "the grounds of complaint in box 11 raised a clear claim of sex discrimination" and tried to explain that to the employee, who was appearing in person. The employers' counsel objected to the course of the proceedings and the chairman indicated that the tribunal would hear all the evidence and then decide whether the claim included a claim for sex discrimination. The decision of the employment tribunal was that the employee had been unfairly dismissed, that it was "just and equitable to grant leave to amend the originating application to include a claim of sex discrimination" and that the employers had discriminated against the employee on the ground of his sex.

SILBER J, allowing an appeal by the employers, said that there had clearly been a very serious misunderstanding between the tribunal and those acting for the employers on the crucial issues of whether a claim for discrimination on grounds of sex was being pursued and, if so, its ambit. The chairman was the person responsible for suggesting the amendment and thus it was clearly her duty to ensure that the parties knew both that the suggested claim for sex discrimination was proceeding and the extent and nature of the claim. In consequence, the employers were prejudiced in a number of significant ways because they would have conducted the proceedings very differently if they had understood the case on sex discrimination in the way in which it appeared that the chairman did. It was settled law that a party to any action had not had a fair hearing where he did not understand or could not reasonably be expected to have understood allegations made against him, which was the position in which the employers were placed. The tribunal failed to comply with that obligation and thus failed to give the employers a fair hearing. It followed that the finding of sex discrimination had to be quashed. The appeal tribunal could not over-emphasise the need for any proposed amendment to the IT1 of major importance to be formulated in *writing* so that everybody involved in the case knew and understood the precise ambit of the proposed amendment. Natural justice then required that if the application for the amendment was not then summarily rejected by the tribunal, the opposing parties should be given an opportunity to consider the proposed amendment and to make submissions on it before the tribunal gave its decision. In that decision the tribunal must explain its thought process in reaching its decision, and, although that could be done briefly, as the discretion to grant leave was a judicial discretion, it had to be exercised fairly and justly. The employers contended that, if the finding of sex discrimination had to be quashed, the finding of unfair dismissal had also to be quashed on the basis of the apparent bias of the tribunal. There were, however, a number of reasons which individually or cumulatively led to the conclusion that the "fair-minded observer" would conclude that it was not a case of apparent bias, but a case in which, though the employment tribunal made a number of serious mistakes, it did not do so deliberately or as a result of any form of bias. Thus, the claim for apparent bias failed and the finding of unfair dismissal was upheld. The next question was whether the claim for sex discrimination should be remitted. Significantly, the actual decision to give leave to amend was apparently only given in the tribunal's extended reasons, which explained that the employers were "not prejudiced by the amendment". The appeal tribunal were unable to agree with the employment tribunal's reasoning, which failed to take account of the fact that the employers had reasonable grounds for not appreciating even the broadest outline of the case being brought against them. They were seriously prejudiced in several ways by the retrospective amendment. Because of that unfairness the appeal tribunal would set aside the employment tribunal's decision giving the employee leave to amend to add his claim for sex discrimination. The appeal tribunal while not accepting the employers' submission that the sex discrimination claim was doomed to failure, could not itself give leave to amend for two reasons. First, the employers might not have had a full opportunity to explain the prejudice that they might suffer by having another hearing; that matter could be considered by the employment tribunal. Second, the employee had to formulate his claim for discrimination on grounds of sex in writing so that it could be considered. Accordingly, the employee's application to amend would be remitted for consideration by a different employment tribunal, and that tribunal would have to consider if leave could be granted to pursue a claim for discrimination on grounds of sex when and if such a claim was properly formulated.

Care First Health Care Ltd v McLaren; 21 June 2004; EAT/982/03
EAT: Silber J, Ms V Branney and Mr D Smith

DISCIPLINARY PROCEEDINGS

An employment tribunal upheld a complaint of unfair dismissal by a school bursar on the ground that flaws in the disciplinary proceedings leading to her dismissal were not minor and could not be overlooked, having found that the staff dismissal committee which determined that the bursar should be dismissed had consisted of only two governors when three were required and that, in express contravention of regulation 47(3) of the Education (School Government) (England) Regulations 1999, a member of that committee had presented the committee's case to the dismissal appeal committee to which the bursar appealed and which confirmed her dismissal.

JUDGE WAKEFIELD, dismissing an appeal by the governing body, said that it was argued that the tribunal were wrong in law to conclude that, in presenting the school's case at the hearing of the applicant's internal appeal against the decision to dismiss her, the person who had chaired the staff dismissal committee that had originally dismissed her was acting in contravention of regulation 47(3) of the 1999 Regulations, by reason (inter alia) that Part IV of the Regulations, which contained regulation 47, was designed to regulate only membership and function of the appeal committee, that if the regulations were designed to regulate the conduct of the hearing they would make reference to the hearing not to the committee, and that Part IV of the Regulations was not designed to regulate who appeared before the appeal committee or who should act for any party before that committee. The appeal tribunal did not accept that the employment tribunal had been wrong in interpreting regulation 47(3) as they did. The words "no member of the staff dismissal committee whose decision is subject to appeal shall take part in the proceedings of the dismissal appeal committee" appeared clearly to be much wider than any words appropriate to a prohibition on such a person being a member of the appeal panel itself.

Governing Body of Cardinal Newman Roman Catholic School v Reid; 18 March 2004; EAT/13/04
EAT: Judge Wakefield, Ms K Bilgan and Mr A E R Manners

PRACTICE

An employment tribunal heard evidence in complaints of sex discrimination over a 12-day period, the last day of evidence being the day before Good Friday. At the chairman's request written closing submissions were delivered the day after Easter Monday and oral submissions were made that afternoon, so that pre-arranged days for chambers discussion did not have to be vacated. The tribunal upheld the applicants' complaints.

BURTON J (PRESIDENT), when allowing an appeal by the respondents on the ground that conclusions of the tribunal as to both direct and indirect discrimination could not stand, said that, after a lengthy hearing, where written submissions were then sensibly ordered by the tribunal, the timescale for preparation of the submissions had to be a sensible one. The pressure imposed on counsel in the present case was quite unfair. It was essential that the timescale should provide for the submissions to be provided to the other party in sufficient time *before* the oral submissions for the other party to be able to assimilate them, and thus comment on them. It was equally, if not more, essential that the tribunal had the opportunity to read the submissions, which it had not in the present case. It was understandable that there must have been concern at the possible waste of time in respect of the days set aside for discussion if a longer period had been given for the written submissions. But it would have been apparent for some time prior to the close of the hearing that it would be completed on the twelfth day; and it would therefore at a relatively early stage have been seen that it was inevitable that there would have to be time for written submissions to be delivered and assimilated, and that the aspiration of using the three days for chambers discussion would have to be shelved. If such decision had been taken at a relatively early stage in the evidence it might still have been possible to have found other business for the tribunal. Turning to the issue of whether the present case should be remitted back to the same tribunal, which would be able to make use of its existing knowledge of the case and notes of evidence, the following were relevant factors. (1) Proportionality was always a relevant consideration. The award was for £900,000, and, although a fresh hearing in front of a different tribunal would add considerably to the cost on both sides, sufficient money was at stake for the question of costs not to offend on the ground of proportionality or even be an important factor. The distress and inconvenience of the parties in re-living a hearing had to be weighed up, but were rendered necessary in any event by the decision to set aside the original decision and would not be greatly less by virtue of the extra time taken by a fully, rather than partially, remitted hearing. (2) Passage of time: an appellate tribunal had to be careful not to send a matter back to the same tribunal if there was a real risk that they would have forgotten about the case. In the present case, however, the question of delay and loss of recollection was not a material factor one way or the other. (3) Bias or partiality: it would not be appropriate to send a matter back to the same tribunal where there was a question of bias or the risk of pre-judgment or partiality. (4) Totally flawed decision: it would not ordinarily be appropriate to send the matter back to a tribunal where the first hearing was wholly flawed or had been completely mishandled. (5) Second bite: there had to be a very careful consideration of what Lord Phillips of Worth Matravers MR in *English v Emery Reimbold & Strick Ltd* [2002] 1 WLR 2409, at para 24, called "a second bite at the cherry". The appellate tribunal would only send the matter back to the same tribunal if it had confidence that, with guidance, the tribunal, because there were matters which it had not, or had not yet, considered at the time it apparently reached a conclusion, would be prepared to look fully at such further matters, and thus be willing or enabled to come to a different conclusion, if so advised. (6) Tribunal professionalism: where a tribunal was corrected on an honest misunderstanding or misapplication of the legally required approach (not amounting to a "totally flawed" decision), then, unless it appeared that the tribunal had so thoroughly committed itself that a rethink appeared impracticable, there could be the presumption that it would go about the tasks set on remission in a professional way, paying careful attention to the guidance given by the appellate tribunal. The appeal tribunal were satisfied that the present was a case that could and should be remitted to the same tribunal. The reality was that there was unfinished business to be done. The tribunal would need to resolve a number of issues in accordance with the present judgment, by reference to evidence previously given and any further evidence to be adduced.

Sinclair Roche & Temperley v Heard; 22 July 2004; EAT/738/03
EAT: Burton J (President), Mr D Bleiman and Mr B M Warman

TIME LIMIT

On a preliminary issue to determine whether an employee, whose employment had commenced on 8 April 2002 and was terminated by a letter posted on 27 March 2003 but not read by the employee until 31 March 2003, had the necessary one-year qualifying period of employment to bring a complaint of unfair dismissal, an employment tribunal held that the employee had been entitled to one week's notice under section 86 of the Employment Rights Act 1996, that the starting point for the computation of that notice was the day after the letter was posted, and that, accordingly, she had not completed one year's employment.

LORD JOHNSTON, allowing an appeal by the employee, said that it was argued by the employee that the period of statutory notice could not run until she was aware that she was being dismissed, which was on 31 March 2003, that she was entitled to seven clear days from that date, taking the position to 7 April 2003, and the one-year qualifying period was established. The appeal tribunal recognised that to peril the effective date of termination on knowledge of the employee being aware of the fact that the employer was terminating their contract might introduce an element of instability, since it put it in the hands of an unscrupulous employee to delay matters by simply not reading or ignoring the letter. Nevertheless there was stability if the matter was periled on the issue of knowledge inasmuch that it was in the hands of the employer to determine how he communicated to his employee his intention to terminate employment. As was pointed out in *McMaster v Manchester Airport plc* [1998] IRLR 112, the safest course was communication verbally even if followed up by a letter. Also, it had to be open generally to argue that if an employee exploited the system, acting in bad faith, he or she could not expect to rely on it. There was no issue of bad faith in the present case. The employment tribunal accepted that the employee read the letter as soon as she received it on returning home. Therefore, the period of seven days' notice did not start to run until 1 April 2003 and the qualifying period was established. With regard to a cross-appeal, 31 March 2003 could not be counted: the statutory entitlement was clearly intended to be seven clear days. The effect of sections 86 and 97 of the Employment Rights Act 1996 was to allow the employee the further four days for which she contended, bringing the qualifying period up to 7 April, which admitted the claim.

O'Brien v Pacitti Jones; 30 June 2004; EATS/25/04
EAT: Lord Johnston, Mr P Pagliari and Mr M G Smith

DEDUCTION FROM WAGES

In two unrelated cases, employment tribunals held that, by virtue of section 14(1)(a) and (5) of the Employment Rights Act 1996, they had no jurisdiction to consider claims by employees, under section 13, that their employers had made unauthorised deductions from their wages. In the first case the tribunal considered that it was not possible to conduct an investigation into whether or not the workers had taken part in industrial action, and in the second case the tribunal concluded that section 14 was concerned with the cause of the deduction not its validity.

BEATSON J, allowing appeals by the employees, said that the proposition that a tribunal was not entitled to refuse to make findings to determine whether it had jurisdiction was well established, and it was common ground that the question whether section 14 of the 1996 Act was engaged went to the jurisdiction of an employment tribunal. It remained to consider which the jurisdictional facts were in section 14(1)(a) and (5). In section 14(1)(a) the jurisdictional fact was that there had been "an overpayment of wages" and in section 14(5) it was that "the worker has taken part in a strike or other industrial action". Only when those facts were established could a tribunal look at the employer's motivation for the deduction, under section 14(1)(a) "the purpose of the deduction" as reimbursement of an overpayment of wages, and under section 14(5) that the deduction was made "on account of the worker's having taken part in that strike or other action". In the case of section 14(5) it did not suffice that a strike or other industrial action had taken place or that the employer considered that the worker who had suffered a deduction from his wages had taken part in the strike or other industrial action. What was crucial to the determination that the tribunal had no jurisdiction was that the worker who had suffered a deduction had taken part in the strike or other industrial action. The statutory purpose behind the provisions now consolidated in the Employment Rights Act 1996 was to see that workers received their wages in full at the time they were due and that employers might not make deductions save in specified circumstances. The carefully circumscribed limits to the jurisdiction of the tribunal in section 14 would be avoided if a tribunal was entitled to determine that it had no jurisdiction without making findings as to the existence of the jurisdictional questions. Where the facts were disputed, to decline jurisdiction without making findings of fact would, in effect, allow a respondent to choose whether the employment tribunal or the county court had jurisdiction by the form of its response to a claim. Where the jurisdictional question was a pure question of law, the tribunal would almost invariably be able to reach a decision on the basis of submissions. Where, however, the jurisdictional question at issue was factual and contested, the tribunal would generally have to have evidence before it on which it could make the necessary finding of fact, and to make that finding. Investigating the jurisdictional facts did not necessarily involve investigating the lawfulness of a deduction and could be considered as a separate question. Section 14(5) could not properly be read as stating that section 13 did not apply "where an employer states that the worker has taken part in a strike or other industrial action". Accordingly, the tribunals fell into error in considering that the determination of the facts which by virtue of section 14(1)(a) and (5) removed the jurisdiction of the employment tribunal would involve them having to consider whether the deductions were lawful in the sense of authorised by the employees' contracts. It followed that they should have found the facts before concluding that they had no jurisdiction: *New Centurian Trust Ltd v Welch* [1990] ICR 383.

Gill v Ford Motor Co Ltd; Wong v BAE Systems Operations Ltd; 16 July 2004; EAT/5/04, EAT/1006/03

EAT: Beatson J, Mr M Clancy and Mr J C Shrigley

TRANSFER OF UNDERTAKING

An employment tribunal held that an applicant had sufficient continuity of employment to bring a complaint of unfair dismissal when his period of service with his previous employer was aggregated with that with the respondent employer, pursuant to section 218 of the Employment Rights Act 1996. The tribunal found that the part of the previous employer's business in which the applicant worked amounted to an undertaking in its own right which was transferred to the respondent.

JUDGE BIRTLES, dismissing the employer's appeal, said that the employer submitted that, in deciding whether there had been a "transfer" within the meaning of section 218(2) of the 1996 Act, the tribunal erred in directing itself as to whether there had been a "transfer of an undertaking" for the purposes of the Transfer of Undertakings (Protection of Employment) Regulations 1981, as they were separate and distinct concepts. But the cases relied on did not support that submission, and the employment tribunal had been right in seeking to avoid a conflict between section 218(2) and the 1981 Regulations and in trying to give the same meaning of "transfer" to both. The employer also submitted that the tribunal erred in holding that the 1981 Regulations themselves preserved statutory jurisdictional continuity for the purposes of an unfair dismissal claim. The question to be asked was whether there was anything in English case law relating to the proper interpretation of section 218(2) which militated against using the definition of "transfer" in the

Regulations. In *Celtec Ltd v Astley* [2002] ICR 1289, the Court of Appeal had recently held that, where it had direct effect, the Acquired Rights Directive preserved continuity of employment on a relevant transfer. Though it appeared that that conclusion was reached with the agreement of the parties, rather than after hearing argument, it was consistent with the decisions of the Court of Justice in *Sanchez Hidalgo v Asociacion de Servicios Aser* (Case C-173/96) [2002] ICR 73 and *Collino v Telecom Italia SpA* (Case C-343/98) [2002] ICR 38. Those cases all concerned the preservation of continuity of employment in cases where the transfer was from one state authority to another provided that the transfer was the transfer of an undertaking or part of an undertaking for the purposes of the Directive. The appeal tribunal could see no difference in the case of a TUPE transfer. Those Regulations had to be interpreted consistently with the Directive and the decisions of the Court of Justice on the equivalent provisions of the Directive. There could be no logical difference between the preservation of continuity between state authorities under the Directive and the transfer of private undertakings covered by the Regulations. There was no error of law in the conclusion reached by the employment tribunal.

D36 Ltd v Castro; 16 July 2004; EAT/853/03
EAT: Judge Birtles, Mr D Smith and Ms P Tatlow

VOLUNTARY WORKER

An employment tribunal upheld a complaint by an applicant that he had been unfairly dismissed by the respondent charity; but it dismissed his complaint that the charity had failed to comply with the National Minimum Wage Act 1998 on the ground that his claim for the national minium wage was excluded by section 44(1) because he was a voluntary worker. The applicant, who had been engaged by the charity as a caretaker for its museum, received free accommodation in return for 17 hours' work per week but no wages. In calculating the basic award for unfair dismissal the tribunal found his entitlement to be nine weeks' wages but made no monetary award since he had been permitted to live in his rent-free accommodation for 13 weeks following his dismissal.

JUDGE PETER CLARK, dismissing an appeal by the applicant, said that it was submitted on behalf of the applicant that section 44 of the 1998 Act was headed "Voluntary workers" and was intended to apply to such workers only; that the expression was not defined in the Act; and that it was clear that the applicant was a "worker" but that his employment was not voluntary: therefore, he was not a voluntary worker caught by the section. That submission suffered from an internal inconsistency. Counsel seized on the words "voluntary worker" as meaning a worker who was a volunteer, and then defined a volunteer as a person who assisted a charitable organisation without obligation to do so. However, such a person was not employed under a contract of service, nor engaged under a contract for services because the necessary mutuality of obligation was absent. He was therefore not a worker. On that ground he was excluded from the protection of the Act. The meaning and purpose of section 44 and its heading was pellucidly clear. It concerned workers, as defined in section 53, employed in the voluntary sector, as defined in section 44(1), who did not receive pay but did receive subsistence, expenses or free accommodation in circumstances relevant to the employment. That fitted the applicant's case neatly, as the tribunal found. He was excluded from the Act by virtue of section 44. Turning to the compensation for the applicant's unfair dismissal, it was accepted that in so far as the tribunal purported to set off the 13 weeks' additional free accommodation against his basic award entitlement, they were wrong in law. The real issue, however, given that nil compensation was ordered, was what nine weeks' pay was in the circumstances of the case. The definition of a week's pay was to be found in section 221(2) of the Employment Rights Act 1996 and was the amount which was payable by the employer under the contract. Old cases under the Redundancy Payments Act 1965 indicated that free accommodation was not pay. Further, it was to be noted that benefit in kind was expressly excluded from the definition of "wages" in section 27 of the 1996 Act; and that exclusion was consistent with the appeal tribunal's interpretation of "pay" in section 221(2). The point was made on behalf of the applicant that he had received nothing for the loss of his statutory rights. The obligation on the employment tribunal, under section 123(1), was to make a compensatory award which was just and equitable in all the circumstances. It was clear that the tribunal found that the provision of free accommodation for 13 weeks post dismissal extinguished any loss of employment rights or notional consultation period. That was a permissible finding.

Best v St Austell China Clay Museum Ltd; 11 June 2004; EAT/924/03
EAT: Judge Peter Clark, Ms K Bilgan and Mr S Yeboah

COSTS

On claims by an applicant employee of wrongful dismissal, breach of contract and unauthorised deduction from wages, the only sums recovered by the applicant were those based on the respondent employers' construction of the contract and on their calculations. The employers applied for an order for costs of £28,000, pursuant to rule 14(1) of the Employment Tribunals Rules of Procedure 2001 on the ground that the applicant had acted unreasonably in bringing or conducting the proceedings or that the bringing or conducting of the proceedings was misconceived. The tribunal, while upholding the application on the grounds that the claims of unfair dismissal and breach of contract had had no reasonable prospect of success and were misconceived, that there had been some unreasonable conduct and that it would be just to make an order for costs, made an award of £750, stating: "The tribunal has looked at the quantum in the round, and in this case the appropriate sum is £750."

BURTON J (PRESIDENT), adjourning an appeal by the employers and remitting the matter to the tribunal for further reasons, said that the words of Lord Phillips MR in *English v Emery Reimbold & Strick Ltd (Practice Note)* [2002] 1 WLR 2409, 2417, reflected the position where, if a costs order was to be made, the respect in which there had been unreasonableness, or one of the other categories of conduct which could lead to a costs order, had first to be identified: "Where the reason for an order as to costs is not obvious, the judge should explain why he or she has made the order. The explanation can usually be brief." Brief was one thing, but the one sentence alone in the entire decision of the tribunal was not even brief, and it formed the fundamental basis of the employers' appeal. It was unfortunate that when the matter came to be sifted at the Employment Appeal Tribunal it was sifted straight through to a full hearing, rather than taking the course explained in *Burns v Royal Mail Group plc* [2004] ICR 1103. It was very often useful where an appeal was based on inadequacy of reasons, or absence of one or more findings, for the matter to be sent back at the earliest stage for such reasons to be given, or such findings to be made, if they could, on the basis of the existing notes of evidence by the tribunal below. The importance of considering the operation of the *Burns* procedure at the sift stage in such a case, rather than waiting for the full hearing, was emphasised. Despite problems of the cost and the fact that the chairman of the employment tribunal was no longer available to sit, the right course was a remission to the same tribunal. The great advantage of the *Burns* route was that, unlike the Court of Appeal and the High Court, the employment tribunal had the power of its own motion to review its decision. Consequently, when the case returned to the tribunal for it to consider what its reasons were for arriving at the sum of £750, so that it could be seen whether its reasons were valid in law, or whether it had any reasons at all, the tribunal would also have the opportunity, if it could not think of any reasons to justify its order, or could not remember its reasons, to review its own order. When the tribunal considered the order for £750, it might do so along the following lines. Was the order a contribution towards the costs? Did it balance the fact that the two claims it found to be misconceived fell to be offset to some extent? Was the £750 an assessment of some part of the costs of the hearing and, if so, on what basis? Was there some doubt as to the total recoverability of the £28,000? In which case, what sum, if any, fell to be deducted? Was there some consideration of the fact that the maximum that could be summarily assessed was £10,000? Was some sum notionally deducted from the costs which otherwise have been awarded, either on the basis of consideration of the means of the applicant (which would be unlawful) or of some other consideration?

Bryant (t/a Bryant Hamilton & Co) v Weir; 21 July 2004; EAT/253/04
EAT: Burton J (President), Mrs C Baelz and Mr D Welch

COSTS

The Employment Appeal Tribunal dismissed an appeal by an applicant trade union, from the refusal by an employment tribunal to make a protective award against the respondent company, on the ground that it was out of time.

BURTON J (PRESIDENT), dismissing an application for costs by the respondent company, said that, though, in the event, the appeal was unarguable, in the circumstances, the appellant had not been acting unreasonably in pursuing the appeal, within the confines of what was an exceptional jurisdiction so far as the award of costs was concerned. In *Coots v John Lewis plc* (unreported) 27 February 2001 it was said that it was not generally the practice of the Employment Appeal Tribunal to award costs in circumstances where the appeal had survived effectively a preliminary stage. If that was then the practice, it was no longer so, and it might well be an impermissible trammel of the power of the appeal tribunal to award costs under rule 34 of the Employment Appeal Tribunal Rules 1993. Inevitably, there was some kind of preliminary process at the appeal tribunal. Every appeal was now sifted by a judge in accordance with the *Practice Direction (Employment Appeal Tribunal: Procedure) 2002* [2003] ICR 122, para 9: some went straight through and some were the subject matter of a preliminary hearing. When there was a preliminary hearing, there was, depending on the precise order made, an obligation on, or an opportunity for, the respondent to submit why the appeal should not go forward. Where, however, as in a very substantial number of cases, the appeal went straight through to a full hearing, there would have been no opportunity for any such input from the respondent, and there ought not to be any practice that, where a case had gone through the sift, or for that matter an ex parte hearing, costs would only be awarded in exceptional circumstances. It would, however, always be a factor that the case had been sifted, when considering whether an appeal had been unreasonably brought, not least because the Registrar had the power effectively to strike out an appeal under rule 3 of the 1993 Rules, if it appeared that there was no jurisdiction to hear it—and, under proposed new rules, if the appeal had no reasonable prospect of success, though that was not the test at present. Another factor was that, under the present Rules, and unlike in the employment tribunals, there was no provision whereby costs could be awarded if proceedings were misconceived, which was defined as having no reasonable prospect of success. The test in the Employment Appeal Tribunal remained whether the proceedings had been brought or conducted unreasonably. Having weighed the matter in the light of all those points, the appeal tribunal concluded that the present proceedings had not been brought or conducted unreasonably by the appellant, albeit without much hope of any success. Though it was pointed out on behalf of the appellant that no warning shot had been fired by the respondent, it would not be right for there to be some kind of condition before it could be said that a case had been brought unreasonably for there to have been a threat of costs. But it was feasible to put a statement in a respondent's answer to the effect that the appeal was entirely one of fact and the appeal tribunal had no jurisdiction. For the future those who had cases at risk of being found to be brought or continued without reasonable prospect of success would be at risk as to costs and should not feel comforted by the existence of a sift order, or even a preliminary hearing order, entitling them to go ahead.

Iron and Steel Trades Confederation v ASW Ltd; 20 July 2004; EAT/452/04
EAT: Burton J (President), Mr R N Straker and Mrs L Tinsley

EQUAL PAY

Four women employees claimed equality of pay with male employees engaged on equivalent work, who were paid the same hourly rate but received in addition a fixed bonus and an attendance allowance, which was paid so long as they turned up for work even if they did not complete their shift. An employment tribunal held that each applicant was entitled to comparity of pay with the male employee most advantageous to them for the purpose of the bonus element of his pay and, in addition, to a relevant comparator for the purpose of the attendance allowance element of his pay.

MITTING J, allowing an appeal by the employers, said that the employment tribunal had concluded that the bonus payments, being calculated on the number of hours worked, were, in effect, part of the standard rate of pay for basic hours, but that the attendance allowance, which only required the worker to turn up for work, was not calculated on an hourly rate and was the subject of a separate term. The following conclusions could be derived from *Hayward v Cammell Laird Shipbuilders Ltd* [1988] ICR 464. First, the tribunal had to compare a term of the woman's contract with a similar term of the man's contract, if there was one. It was impermissible to consider the whole of the contractual or other benefits which could be categorised as pay. Secondly, "term" meant "a distinct provision or part of the contract which has sufficient content to make it possible to compare it from the point of view of the benefits it confers with a similar provision or part in another contract". Thirdly, the terms of the individual contracts under consideration had to be analysed to discern which of them were separate and distinct terms or parts of the contract, or which of them made comparable provision for the same subject matter. Fourthly, to determine whether or not the provisions of an agreement constituted one or more than one term, it was necessary to examine their content. Fifthly, most contracts of employment contained mutual obligations: on the employee to attend for work, on the employer to make monetary payment in return. Sixthly, the provision for payment in many contracts would include an obligation to pay an hourly wage or monthly salary, but might also include, as in the present case, a fixed uplift, labelled by the parties as a bonus. As the employment tribunal had rightly held, the provision for a fixed uplift was not a separate and distinct term or part of the contract but part of the same term as that for the payment of the hourly rate. The question was how to define that term. It could be precisely defined as: "provision for monetary payment for the performance of the contract by employees during normal working hours." The question then was: what was the status of the attendance allowance? The appeal tribunal's view was that it did relate to the same subject matter as basic hourly pay and the bonus, and that it was an element of a distinct part of the contract and not itself a distinct part. It was part of the monetary payment for performance of the contract. The fact that it could on occasion be paid to a man who left soon after he attended work did not make it any less so, because attendance at work and performance of some work was the obligation in respect of which it, like the basic hourly pay and the bonus, was paid. All monetary payments received by the male comparators for normal working hours should be aggregated and divided by the number of hours in the working week, to give an hourly rate. That hourly rate should be compared with the woman's rate; if it was greater, the woman's hourly rate should be increased to eliminate the difference. The tribunal had erred in deciding that the provision for the attendance allowance was a separate term and not part of a single term.

Redcar and Cleveland Borough Council v Degnan; 27 July 2004; EAT 321/04
EAT: Mitting J, Miss G Mills and Mr P A L Parker

UNFAIR DISMISSAL

An employment tribunal upheld an applicant employee's complaint of unfair dismissal, holding that dismissal was a disproportionate sanction and outside the range of reasonable responses, in circumstances where two other employees also involved in the events which had led to the applicant's dismissal had merely been reprimanded or not disciplined at all.

MITTING J, allowing an appeal by the employers and remitting the matter to the employment tribunal, said that the employment tribunal had not referred to the guidance of the Employment Appeal Tribunal in *Hadjioannou v Coral Casinos Ltd* [1981] IRLR 352 as to the approach to be taken when comparing action taken against one employee with that taken against a dismissed employee. That approach was considered by the Court of Appeal in *Paul v East Surrey District Health Authority* [1995] IRLR 305, where the court stated that it would be wise for any employment tribunal considering such a situation to follow it. The guidance was: "[counsel] has submitted that an argument by a dismissed employee based upon disparity can only be relevant in limited circumstances. He suggests that, in broad terms, there are only three sets of circumstances in which such an argument may be relevant to a decision . . . Firstly, it may be relevant if there is evidence that employees have been led by an employer to believe that certain categories of conduct will be either overlooked, or at least not dealt with by the sanction of dismissal. Secondly, there may be cases in which evidence about decisions made in relation to other cases supports an inference that the purported reason stated by the employers is not the real or genuine reason for dismissal . . . Thirdly, [counsel] concedes that evidence as to decisions made by an employer in truly parallel circumstances may be sufficient to support an argument, in a particular case, that it was not reasonable on the part of the employer to visit the particular employee's conduct with the penalty of dismissal and that some lesser penalty would have been appropriate in the circumstances. We accept that analysis . . . We should add, however . . . that [employment] tribunals would be wise to scrutinise arguments based upon disparity with particular care . . . there will not be many cases in which the evidence supports the proposition that there are other cases which are truly similar, or sufficiently similar, to afford an adequate basis for the argument." The employment tribunal should have expressly reminded itself of that valuable guidance. Clearly the first and second circumstances did not arise in the present case but the third did. The tribunal did not expressly ask itself whether the other employee's position was truly comparable with that of the applicant. Had it asked itself the question posed in the guidance it would have done so. Because the tribunal had not posed and expressly answered the question, its decision was legally flawed.

Hillcrest Care Ltd v Morrison; 21 July 2004; EAT/299/04
EAT: Mitting J, Mr M Clancy and Mrs A Gallico

COMPENSATION

Following findings of unfair dismissal, an employment tribunal, when assessing compensation in respect of the applicants' loss of pension rights, rejected, without consideration, the approaches suggested by the parties on the ground that neither was suggested in the booklet "Compensation for Loss of Pension Rights Employment Tribunals", 3rd ed (2003) and made an evaluation based on the advice in the booklet.

JUDGE PROPHET, allowing an appeal by the employer, said that the employment tribunal's approach was an error of law. The point about the booklet was that it might assist an employment tribunal when there was little forthcoming from the parties as to how to approach what was recognised to be a difficult area, i e assessing a proper compensation of loss of pension rights. However, there was no duty on an employment tribunal to follow the guidelines in the booklet. In particular, where the parties, or one of them, put forward credible evidence and submissions on the matter, the first duty of the tribunal was to consider that evidence and those submissions in order to ascertain whether a fair and equitable assessment of the loss of pension rights could be worked out on that basis. If it could not, the tribunal had adequately to explain why not. To say, as the present tribunal had, that it rejected the parties' submissions *entirely* on the basis that it was not one suggested in the booklet was an error of law. That justified allowing the appeal in respect of the assessment of the loss of pension rights, and the matter of the appropriate compensation would have to be determined on remission. The employer also appealed against an award for future loss in respect of one applicant which was based on a period of five years. That was not only in excess of that proposed by the employer, it was also in excess of that asked for in the applicant's schedule of loss. Although it was unlikely that an employment tribunal would award in any compensation assessment more than an applicant claimed, it was not necessarily an error of law to do so. There might be particular circumstances, especially perhaps where an applicant was not legally represented, where a tribunal felt that to do justice it was necessary to do so. However, in the present case, where both parties had the benefit of legal representation, it was incumbent on the tribunal, if minded to award *more* than was claimed, to do so only after having given both sides an opportunity of making submissions on the matter. That had not been done, and, accordingly, that matter, too, would have to be redetermined on remission. It could be unwise in some cases for employment tribunals to rely on written submissions proposed and submitted after the end of the hearing. Time allocations were designed to include submissions before the hearing ended. While it was always helpful for submissions to be reduced to writing, the opportunity of presenting those submissions to a tribunal at a hearing gave more opportunity for consideration to be given by each representative to adding additional points or making observations on the other side's submissions.

Port of Tilbury (London) Ltd v Birch; 9 September 2004; EAT/415/04
EAT: Judge Prophet, Mr B V Fitzgerald and Mr B R Gibbs

COSTS

After dismissing complaints of unfair and wrongful dismissal, an employment tribunal made an award of costs against the applicant, under rule 14 of the Employment Tribunals Rules of Procedure 2001, on the ground that he had acted unreasonably in continuing with his unfair dismissal claim after receiving a letter from the respondent employers stating that they would not pursue an application for costs if he withdrew his claim at that stage.

JUDGE PROPHET, allowing an appeal by the applicant, said that it was correct that the appeal tribunal could not lightly interfere with the exercise by an employment tribunal of its judicial discretion in respect of awarding costs. It was also correct that, unlike the civil courts, costs were not usually awarded in respect of employment tribunal cases: see the judgment of Mummery LJ in *McPherson v BNP Paribas (London Branch)* [2004] ICR 1398. The employment tribunal's reasoning made it clear that the tribunal was awarding costs against the applicant for having acted unreasonably in pursuing the proceedings after the respondents had offered not to pursue costs against him if he withdrew his claim within 24 hours. Bearing in mind the nature and contents of the offer, the applicant must be right in saying that a failure to accept it could not in itself constitute unreasonable action in bringing or pursuing the proceedings. Parties frequently made threats of costs applications prior to hearings. Further, unsolicited, reasons provided by the tribunal chairman relating to the award of costs included: "in view of the sums involved and the fact that [by the time of the offer] it should have been abundantly clear to the applicant and his advisers that the contemporary documents did not support his version of events which is likely to be disbelieved, the tribunal was of the unanimous opinion that the applicant had acted unreasonably and that an order for payment of costs . . . was appropriate." The outcome of the unfair dismissal case had ultimately to be decided by the employment tribunal on the basis of hearing all the evidence, the availability of which had not been finalised by the time of the offer; no witness statements had been exchanged by then. What employment tribunals usually needed to consider was whether at the conclusion of the case a party could be said to have had an arguable case in any respect, including, for example, procedural matters, even if ultimately unsuccessful. The reasoning should therefore explain the tribunal's findings on that issue. Although the employment tribunal found against the applicant, they did not accuse him of lying. It frequently happened that employment tribunals found the totality of the evidence from one side preferable to that from the other side, without it triggering a costs order. The reasoning of the employment tribunal did not support a finding that the applicant had acted unreasonably within the terms of rule 14(1).

Lake v Arco Grating (UK) Ltd: 3 November 2004: EAT/511/04
EAT: Judge Prophet, Mr T Haywood and Mr H Singh

COSTS

An applicant's complaint of unfair dismissal was ruled out of time but she was allowed to proceed with a claim of sex discrimination based on the dismissal, though she was not permitted to pursue a case based on alleged earlier incidents nor any post-dismissal matters. Further and better particulars served by the applicant purported to include alleged incidents subsequent to dismissal, and the respondents wrote complaining that the proceedings were being conducted in a misconceived and vexatious manner. After dismissing the complaint of sex discrimination, the employment tribunal ordered the applicant to pay the respondents' costs, to be assessed in the county court, on the grounds that the bringing and conducting of the proceedings had been misconceived and that she had acted unreasonably in conducting them. The tribunal found that the claim had no reasonable prospect of success: that many of the incidents alleged did not happen or not in the way alleged and that there was no discriminatory element to the incidents that had happened, including the dismissal itself. It also held that considerable time was taken up by unnecessary and irrelevant evidence and that late allegations had been pursued, and it was very concerned about one very late allegation of a post-dismissal incident.

BURTON J (PRESIDENT), dismissing an appeal by the applicant, said that the relevant rule was rule 14 in Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2001, regulation 2(2) of which provided that "misconceived", which was added as a ground for the first time by the 2001 Regulations, included "having no reasonable prospect of success". The applicant's submission was that costs orders in employment tribunals were exceptional and that in making the costs order against the applicant the tribunal erred in the exercise of its jurisdiction. Reference was made to *Lodwick v Southwark London Borough Council* [2004] ICR 884, para 23, in which Pill LJ said: "Costs are rarely awarded in proceedings before an employment tribunal . . . Costs remain exceptional" and made specific reference to *Gee v Shell (UK) Ltd* [2002] ICR (Recent Points Part 12)—a case where the hearing was before the amendment to the Rules—without expressly saying anything about the effect of the amendment. The employment tribunal in the present case recognised the limitations on its jurisdiction. It did not use the word "exceptional", which, of course, did not appear in the Rules in any event, but it did use the word "rare". Those words did not oust the statutory requirement for the tribunal to be satisfied that one or more grounds for a costs order existed, and at best would go to the exercise of discretion, once grounds were established. The employment tribunal was ordinarily a costs-free jurisdiction and something special or exceptional was required before a costs order would be made, in whole or in part, and even if the necessary requirements of rule 14 were established there would still remain a discretion. Costs orders were "exceptional" because there was a high hurdle to be surmounted before such an order could be considered. Even if the employment tribunal had not used words which showed that it appreciated that a costs order was exceptional or rare, provided it had applied the right test, no error of law arose. The appeal tribunal were entirely unpersuaded that the tribunal's conclusion that the case was misconceived was either perverse or unreasoned. On the alternative ground, the applicant's proposition was that the tribunal had to identify with particularity the causative link between the unreasonable conduct found and the costs ordered and it had failed to do so. The position had now been authoritatively canvassed in *McPherson v BNP Paribas (London Branch)* [2004] ICR 1398, where Mummery LJ said, at para 40: "The principle of relevance means that the tribunal must have regard to the nature, gravity and effect of the unreasonable conduct as factors relevant to the exercise of the discretion, but that is not the same as requiring [the respondent] to prove that specific unreasonable conduct by [the applicant] caused particular costs to be incurred." and, at para 41: "It is not . . . impermissible for a tribunal to order costs without confining them to the costs attributable to the unreasonable conduct . . . the unreasonable conduct is a precondition of the exercise of the power to order costs . . ." The history of the present proceedings more than justified the finding by the tribunal.

Salinas v Bear Stearns International Holdings Inc; 21 October 2004; EAT/596/04
EAT: Burton J (President), Mrs J M Matthias and Sir William Morris

PROCEDURE

Following the remission by the Employment Appeal Tribunal of the issue of compensation for future loss, on a complaint of unfair dismissal, for further consideration by the employment tribunal, in the absence of any clear finding as to whether the employee had ever applied for jobs at a similar salary or whether such jobs were not available, the employment tribunal heard further evidence on behalf of the employee and made a finding of future loss based on that evidence.

LORD JOHNSTON, dismissing an appeal by the employers, said that the employers submitted that the jurisdiction of the employment tribunal on a remit was limited to the remit created by the appeal tribunal and that the phraseology used by the appeal tribunal excluded the hearing of further evidence at the subsequent hearing before the employment tribunal. It was, they submitted, inappropriate to allow the employee a second bite at the cherry; if there was no evidence before the initial tribunal on the relevant factor, that should have been the finding. The appeal tribunal recognised that, in making a remit, the phraseology it used had to be construed objectively by the employment tribunal whose jurisdiction in dealing with the matter was limited to that construction. It had no further jurisdiction to hear the case. The word "reconsideration", however, conferred a discretion on the employment tribunal in determining how best to go about the matter remitted. Reconsideration could, therefore, contemplate further evidence. Although it was perfectly legitimate for the employers to point out that, on one view, the employee had failed to make out her case on future loss at the initial hearing, it also had to be said that a loss on the face of it was undoubtedly suffered. The procedure followed by the tribunal was obviously fair and balanced and no complaint was made about the actual finding. The tribunal took a course that was open to it in the circumstances.

Romium Ltd v McMillan; 20 September 2004; EATS/113/03
EAT(Sc): Lord Johnston, Miss S B Ayre and Mr P M Hunter

SEX DISCRIMINATION

An applicant complained of sexual harassment, alleging that male colleagues had downloaded pornographic images onto a computer in the room where they all worked. An employment tribunal dismissed the complaint, holding that it was not satisfied that she had been shown the images or that she had made any complaint about others viewing such images in her presence.

JUDGE ANSELL, allowing an appeal by the applicant, said that it was argued on behalf of the applicant that, under section 63A of the Sex Discrimination Act 1975 and the guidelines in *Barton v Investec Henderson Crosthwaite Securities Ltd* [2003] ICR 1205, the tribunal was obliged to find whether there were any prima facie facts from which the tribunal could conclude, in the absence of an adequate explanation, that the employers had committed an act of discrimination. If it so found, then the burden would shift to the employers to disprove the suggestion that had arisen by virtue of the primary facts found. It was contended that the facts plainly could have amounted to discrimination in the form of sexual harassment; that the sort of sexual behaviour of which complaint was made, carried out by male office workers in the presence of a female, whether or not actually directed towards her, clearly had the effect of amounting to an affront to her dignity; and that the facts were so obvious that the tribunal was bound to conclude that, viewed objectively, the behaviour did have that potential. It was submitted that the lack of complaint from the applicant, which was at the core of the employment tribunal's decision, was not a relevant factor in assessing detriment, and reference was made to *Driskel v Peninsular Business Services Ltd* [2000] IRLR 151, para 12. The appeal tribunal accepted those submissions. Viewed objectively, the behaviour complained of, namely that on three occasions male colleagues in the same room were downloading onto a computer pornographic material, clearly had the potential effect of causing an affront to a female employee working in the close environment and, as such, would be regarded as degrading or offensive to an employee as a woman. It was clearly potentially less favourable treatment and a detriment followed from the nature of the behaviour; and there was evidence before the tribunal that the applicant had found the behaviour unacceptable. The fact that she did not complain at the time did not afford a defence where the behaviour was so obvious. That being the situation arising from the primary facts, the burden then shifted to the employers to show that there was not less favourable treatment, for instance that the applicant was a party to, or enjoyed, what was going on. That had not happened, as the employers had played no part in the proceedings, and it followed that a finding of sexual discrimination would be substituted and the matter remitted for a remedies hearing.

Moonsar v Fiveways Express Transport Ltd; 27 September 2004; EAT/476/04
EAT: Judge Ansell, Mrs L Tinsley and Miss S M Wilson

COMPENSATION

Following the remission by the Employment Appeal Tribunal [2003] ICR 1556 of consideration of the status of an applicant who had gone to work for the respondent pursuant a three-year modern apprenticeship agreement, the employment tribunal found that the applicant had been unfairly dismissed, and that his complaint of breach of contract failed. The tribunal awarded compensation of £2,966, having applied a 50% reduction for contributory fault to a sum which included £2,000 for lost opportunity following completion of the contract.

JUDGE ANSELL, allowing in part an appeal by the employer, said that the employment tribunal had concluded that, while there was a training element in the parties' relationship, it was overwhelmingly that of employer/employee. (The applicant was paid by the respondent, not the college.) The tribunal also found that the applicant was guilty of substantial default in the relationship and that under the terms of the contract including the training element the employer was entitled to terminate the contract in the ordinary way without being bound to conclude the 36 months of the contract. The employer had properly raised the issue of the award for loss of benefits of apprenticeship, arguing that, if the tribunal was satisfied that he was entitled to bring the contract of apprenticeship to an end, why should he be liable for the loss of benefit the applicant could have obtained by qualifying at the end of his apprenticeship. There was merit in that argument, because on the face of it there was perversity in the tribunal finding on the one hand that the employer was entitled to terminate the contract and on the other awarding a sum that effectively arose out of that contract that should have run its full course. The compensation would be reduced by £1,000, and to that extent the appeal succeeded.

Thorpe v Dul; 6 September 2004; EAT/42/04
EAT: Judge Ansell, Ms B Switzer and Mr S Yeboah

COMPENSATION

Following findings of unfair dismissal and disability discrimination, an employment tribunal assessed compensation for the disability discrimination, and awarded £11,813 for earnings lost up to the date of the hearing and £118,818 for a future loss of earnings of eight years and two months, the period until the applicant's retirement date, making a one-off deduction of 2.5% for accelerated payment.

JUDGE RICHARDSON, allowing an appeal by the employers, said that the decision of the Employment Appeal Tribunal in *Kingston upon Hull City Council v Dunnachie (No 3)* [2004] ICR 227 was concerned with the assessment of future loss of earnings following an unfair dismissal, but similar principles applied to the assessment of future loss of earnings following a discriminatory dismissal. In that case the appeal tribunal had been concerned with the question whether the Ogden Tables should generally be used in assessing compensation for unfair dismissal. The tables, devised for use in personal injury cases, for the most part provided a multiplier for loss of earnings to date of retirement that took into account mortality and the accelerated payment of an award of damages. The essential task of the employment tribunal was to place the dismissed employee, as regarded loss of earnings, in the position which he would have been in if he had not been dismissed unfairly or by unlawful discrimination. That involved estimating what the employee would have earned but for the dismissal, taking into account the employee's prospects of remaining in employment, and also what would actually happen, taking into account the employee's prospects of obtaining other employment. The Ogden Tables came into their own if and only if the employment tribunal concluded, after making those estimates, that the employee should be compensated for a period lasting up to an age for which the tables provided a figure. Otherwise the tribunal had to do its own calculations based on its own estimates. In particular it would have to make its own allowance for accelerated payment. In the present case the employment tribunal, in making its one-off allowance of 2.5% for accelerated payment of an award representing a period of eight years two months, appeared to have thought that it was following the practice of the civil courts in personal injury cases. In that respect it was wrong. The amount of allowance for accelerated payment was not fixed; it depended on the extent of the acceleration. In *Bentwood Bros (Manchester) Ltd v Shepherd* [2003] ICR 1000, the Court of Appeal considered a similar mistake and held that an employment tribunal was wrong when it applied a single discount of 5% to take account of accelerated payment on awards covering two and a half years' loss of earnings and ten years' pension loss. The discount rate prescribed for use in personal injury cases was set at 2.5% by the Damages (Personal Injuries) Order 2001, and, though an employment tribunal was not bound by that discount, it was good practice to adopt it. The employment tribunal in the present case, therefore, committed no error of law in taking a 2.5% discount rate, but it was wrong to limit the discount to a single amount. The loss was calculated on the basis that it would accrue in a straight line over more than eight years. The discount for accelerated payment should reflect the fact that the employee would be able to invest the sum and obtain an additional benefit before it was required to meet his loss. For example, the amount required to meet his loss in the eighth year would be available for him to invest for seven years before it was required, and so on. No sophisticated calculation was required, but it was important to reflect the whole period. Equally, to allow 2.5% over the whole period of loss would be too great. Receipt of the whole sum was not accelerated for the whole period. If the loss accrued in a straight line, rateably over the whole period, receipt of the sum was, overall, accelerated for approximately half the period, and the discount rate would apply to the whole sum for approximately half the period. Thus, in the case where the loss accrued rateably over eight years, one would expect a discount of approximately 10%. If further sophistication was required, no doubt the parties would be entitled to refer the tribunal to an appropriate table, but an employment tribunal made no error of law if it set a discount rate on the broad considerations set out above. The employment tribunal had also assumed, without giving reasons, that the applicant's loss should go to retirement. It had failed to consider, or entirely failed to give reasons for its conclusion as to, material relevant to the issues of whether the applicant would have continued in employment with the respondent and if so for how long. The case would be remitted to the same tribunal.

Benchmark Dental Laboratories Group Ltd v Perfitt; 2 November 2004; EAT/304/04
EAT: Judge Richardson, Mr D Evans and Mr I Ezekiel

COMPROMISE AGREEMENT

An employment tribunal held that an agreement, in a standard form used by the employer, whereby the applicant employee had compromised earlier complaints against his employer did not preclude him from pursuing a complaint under section 47B of the Employment Rights Act 1996. Clause 9.1 of the agreement provided: "This agreement is made . . . in full and final settlement of all claims . . . which the employee has or may have against the [employer] . . . arising out of or in connection with his employment, the termination of his employment or otherwise including in particular the following claims . . ."

JUDGE ANSELL, allowing an appeal by the employer, said that the compromise agreement, though containing in clause 9.1 a lengthy list of possible claims which had been compromised, most if not all of which had not been raised by the employee as possible claims, did not include any reference to a claim under section 47B of the 1996 Act which had clearly been raised in previous correspondence between the parties. The applicant had sought to commence proceedings under section 47B alleging detriments suffered before the termination of his employment that he had previously raised in correspondence over the years. The argument centred around the words in section 203(3)(b) of the 1996 Act that [to be valid] the agreement "must relate to the particular proceedings". Did that mean that the particular claim being compromised actually had to be specified within the body of the agreement, or merely raised in proceedings or correspondence prior to the agreement being concluded? The employer argued that in *Lunt v Merseyside TEC Ltd* [1999] ICR 17 the Employment Appeal Tribunal had approved the approach of an employment tribunal in finding that it was not necessary that the compromise agreement specifically mentioned the claims being compromised as long as they had previously been raised and that it was within the scope of the agreement as a matter of construction, i e it related to the proceedings, and that, as in *Lunt*, the general settlement clause was sufficient to compromise the claim under section 47B. On the section 203 issue, the appeal tribunal had no hesitation in agreeing with the employer's submissions and, in particular, were satisfied that *Lunt* could be regarded as authority for the proposition that the words "relate to" simply referred proceedings or claims which had been raised as opposed to the necessity of setting them out within the body of the compromise agreement. As a matter of documentary construction, the appeal tribunal were satisfied that the section 47B claim fell within the scope of the general clause at the commencement of clause 9.1 of the agreement and that the list that followed was, in the words of Diplock LJ (in *C Maurice & Co Ltd v Minister of Labour* [1968] 1 WLR 1337, 1345), "intended to be illustrative and nothing more". Accordingly, the originating application would be struck out on the basis that the complaints therein made under section 47B of the 1996 Act were compromised by the agreement.

University of East London v Hinton; 22 October 2004; EAT/495/04
EAT: Judge Ansell, Mrs C Baelz and Miss G Mills

REVIEW

Following the presentation of an originating application in September 2002, complaining that she had been unfairly dismissed and racially discriminated against, an employee was reinstated by her employer but was again dismissed in March 2003. Solicitors acting on her behalf withdrew her existing claim and lodged a second originating application. An employment tribunal chairman, giving case management directions, recorded that "for the avoidance of doubt" all complaints relating to the 2002 disciplinary procedures were dismissed. The regional chairman, giving further directions, purported to review that direction and allowed the original claim of race discrimination arising out of the first dismissal to proceed to a hearing on the merits.

JUDGE McMULLEN QC, allowing an appeal by the employers, said that whether the first chairman was simply recording her appreciation of events or making a new decision did not matter, for it was undoubtedly a "decision" by the chairman. Certain aspects of it might be described as an interlocutory order which would take it outside the remit of being a decision, but the best view of it was that it recorded a decision. A decision could be reviewed, whereas the mechanism for challenging an order, which could not be reviewed, was to appeal to the Employment Appeal Tribunal or to seek a variation or discharge of the order within the liberty usually given by a set of standard words at the end of the order. Further, the regional chairman had had no power to review the chairman's decision. Though a decision could be reviewed, it could not be reviewed by a chairman sitting alone. For that reason also the instrument would be quashed. Another ground for allowing the appeal was that no reasons had been given for allowing a review to take place out of time. It was plain that effect had been given to the employee's application to withdraw her first complaint following clear legal advice that her claim should be withdrawn and thus dismissed and no additional reasons had been given for that matter to be reopened. It was not in the interests of justice for litigation to continue open-endedly, and the principles of cause of action estoppel (or more accurately "right to complain" estoppel) applied in the employment tribunal.

Safeway Stores Ltd v Royer: 25 August 2004: EAT/520/04
EAT: Judge McMullen QC (sitting alone)

CASE MANAGEMENT

An employment tribunal upheld an employee's complaint of unfair dismissal and ordered compensation for nine months' future loss of earnings, having refused to allow the employer to adduce additional documents (in the form of a 61-page bundle) on the day of the hearing.

JUDGE McMULLEN QC, dismissing an appeal by the employer (who contended that the additional bundle would have shown that the employee's poor record meant that he would have been dismissed at some stage in the future), said that directions had been given to the respondent employer to prepare the documentation needed at the hearing and an order had been made for the provision of a single agreed bundle. The order made by the chairman on behalf of the tribunal was that the documents would be excluded unless they were relevant to an issue, and no explanation was recorded in the chairman's notes as to why the employer thought the documents were relevant. That was ordinary case management. In advance of the hearing orders had, sensibly, been given for the production of documents, which the respondent did not follow. It was open to the tribunal to allow the material, and there was no error in principle in its decision as to the way in which the case was to be managed. But even if there were any valid criticism of the tribunal's decision to exclude the bundle, as a matter of substance the appeal tribunal accepted that any material relevant to the assessment of compensation was before the employment tribunal. The appeal tribunal were grateful to the chairman for producing her extract from her notes so as to inform the tribunal of the reasons for the refusal of the documents. The appeal tribunal saw the decision made by the employment tribunal as normal case management. When such a decision was made after contested submissions, reasons should be given. It would be quite satisfactory for them to be included in reasons, given orally or in writing, for any judgment at the hearing, since it was effectively a judgment on a contested procedural issue.

Environment Plus (UK) Ltd v Parton; 11 November 2004; EAT/458/04
EAT: Judge McMullen QC, Mrs A Gallico and Ms P Tatlow

DELAY

An employment tribunal gave its reserved decision to uphold two employees' complaints of unfair dismissal, on the ground that the procedures adopted by the employer were fundamentally flawed, six months after the hearing. The respondent employer appealed, primarily, on the ground that the delay rendered the decision unsafe.

LORD JOHNSTON, dismissing the appeal, said that, though delay had been identified as a possible relevant factor in determining whether decisions of tribunals were safe, it had to be emphasised that the mere passage of time was not enough itself. There had to be some clear connection with that passage of time and flaws in the decision. The period of six months was to be deprecated as being too long for any employment tribunal to delay its decision but it did not per se immediately grant any relief on appeal. More importantly, if there were concerns by a party disaffected by a decision of a tribunal which had been subjected to delay, those concerns should be ventilated by way of review and not by way of appeal. That position was offered not as a matter of law but of practice. The appeal tribunal was not prepared to entertain appeals with regard to the issue of delay alone, without the employment tribunal having been given, initially, an opportunity to review its position, and that had not happened in the present case. An application for review had been made, but no attempt was made subsequent to the promulgation of the decision to seek a review based on evidential discrepancies or inadequacies. The appeal tribunal wished to emphasise to the profession that it was extremely important to use the review procedure to address what appeared to be understandable grievances relating to the decision of a particular tribunal which could be rectifiable by a review. In the circumstances, the appeal tribunal was not prepared to entertain the arguments advanced on the inadequacies of the evidential conclusions of a tribunal which might be related to delay. On the more fundamental issue put forward, that on the evidence the tribunal should not have concluded that the employees were denied natural justice by not being given adequate notice of the case against them, the most cursory reading of the tribunal's very extensive judgment made it clear that the tribunal reached the clear conclusion that the employer had totally failed, at the necessary stage of the initial disciplinary hearing, to give the employees a clear statement of what allegations of fact they were facing and what the consequences might be. The appeal would be dismissed. The appeal tribunal, however, wished to reiterate that a six-month delay in issuing a determination was not acceptable, except in the most exceptional circumstances. Any decision should be promulgated within three months but if that time limit was not met that did not give an automatic ground of appeal.

Micron Europe Ltd v Inglis; 19 November 2004; EATS/40/04
EAT(Sc): Lord Johnston, Mr P Pagliari and Mrs E Hibberd

EMPLOYMENT TRIBUNAL

An employment tribunal hearing a claim of sex discrimination reviewed the conflicting evidence as to a number of alleged incidents of harassment, but concluded, inter alia, that evidence given by a friend of the applicant that the applicant had complained to her of the harassment she was receiving was hearsay and they could make no finding; that there was a direct conflict in relation to one allegation and they were not able to make any finding as to whether it occurred; and that there was no corroborative evidence in relation to other allegations and for that reason they could make no findings as to them. The tribunal dismissed the complaint.

JUDGE RICHARDSON, allowing an appeal by the applicant and remitting the case to a different tribunal, said that, in a case where there were disputed issues of fact relevant to the question whether there had been unlawful discrimination, the employment tribunal had a duty to resolve the disputes and find the primary facts. It would generally be the duty of a tribunal faced with the decision as to whether a particular event occurred or not to find as a fact whether it occurred. If there was evidence both ways the tribunal *could* decide either way. Generally that was precisely what it should do. There would be rare occasions when the evidence was so finely balanced that the tribunal would be unable to make up its mind. In that rare event the tribunal should say so and the burden of proof would decide the issue. The authority for those propositions was *Morris v London Iron and Steel Co Ltd* [1987] ICR 855, 864. Further, use of a formula expressed in terms of "cannot" and "unable to" might suggest that the tribunal thought there was some legal bar to a particular result. There was no legal bar to a tribunal believing one witness against another. Also, the parties at the end of a case were entitled to know why they had won or lost. The tribunal's approach was inimical to that. It should say whose evidence it did or did not believe and why. If the tribunal was intending to say it found it impossible to make up its mind about the complaints and that it was an exceptional case where it relied on the burden of proof, it should have said so. If it rejected the applicant's evidence wholly or in part and found her allegations untrue it should have said so and given succinct reasons for its conclusions. The strict rules of evidence did not apply to an employment tribunal. Hearsay evidence was admissible. It was, therefore, not a conclusive argument for a tribunal to say that a piece of evidence was hearsay. The value of a piece of hearsay evidence would vary enormously depending on the issues, the other available evidence and all the circumstances. Those were matters of assessment for a tribunal. Likewise there was no legal requirement for corroboration of any kind of evidence. It was, therefore, not a conclusive argument to say that evidence was not corroborated. A tribunal could, of course, say, after assessing the evidence, that it found the evidence of a particular witness so unsatisfactory it was not prepared to act on it unless there was other evidence to support it. The manner in which the tribunal treated the evidence of the applicant's friend was wrong in principle. If it believed her, the applicant was making contemporaneous complaints of sexual harassment, and that was relevant to an assessment of her credibility. Likewise, the tribunal's references to corroboration were unsatisfactory.

Peart v Dixons Store Group Retail Ltd; 10 November 2004; EAT/630/04
EAT: Judge Richardson, Mr D J Jenkins and Mr R N Straker

PRACTICE

An employment tribunal dismissed an employee's claim that he had been subjected to a detriment for making a protected disclosure. He appealed but subsequently instructed his solicitors to withdraw the appeal. Before a sealed order dismissing the appeal had been issued by the Employment Appeal Tribunal the solicitors wrote applying to restore the appeal on the ground that the appellant had been suffering from a "mini-breakdown" when he had instructed them to withdraw his appeal.

BURTON J (PRESIDENT), directing that the appeal be restored, said that *O'Neill v Governors of St Thomas More Roman Catholic School* (unreported) 12 October 1995 showed that, notwithstanding the apparently limited role of rule 33 of the Employment Appeal Tribunal Rules 1993—if *Blockley plc v Millner* [1992] ICR 749 was strictly applied—there was room for the Employment Appeal Tribunal to allow the withdrawal of a withdrawal of an appeal. While reiterating the fact that it required an unusual or exceptional case to permit the revoking of an order dismissing an appeal of a party making a decision on legal advice to withdraw it, the Employment Appeal Tribunal in *O'Neill* concluded that they should allow such a course, on the basis that it satisfied the requirements of justice to reopen the matter. In the present case the appellant's solicitors asserted that although the appellant had legal advice available to him, his state of mind was such that he refused to discuss the matter with his solicitor. In so far as *O'Neill* set a precedent for the revoking of an order that had been sealed, some three months later, the position was a fortiori where the order had not been sealed and the period of time was considerably shorter. Whereas there could be relevance in the Civil Procedure Rules—on r 40.7 of which the respondent relied by analogy—and paragraph 1(9) of the *Practice Direction (Employment Appeal Tribunal: Procedure) 2002* [2003] ICR 122 stated that the appeal tribunal was guided by those Rules where appropriate, they were not of assistance here. On the assumption that the appeal tribunal was dealing with a review of an order, his Lordship concluded that the interests of justice required a review leading to a revocation of the order. Alternatively, if there was no order requiring revocation, because it was not sealed, his Lordship in any event would direct that the appeal be restored. The reasons for so concluding did not relate to any decision whether or not the appellant had been labouring under any physical or mental problems at the time of the withdrawal, but were that, by comparison with *O'Neill*, the appellant acted with greater celerity; the appeal was not withdrawn as a result of receiving legal advice in connection with so doing; no material prejudice would be suffered by the respondent; and the appeal tribunal had, on the sift, before the withdrawal, considered the appeal to be arguable such as to fix a full hearing.

Brain v Corby Borough Council; 10 November 2004; EAT/376/04
EAT: Burton J (President)

TIME LIMIT

A claimant submitted his claim of unfair dismissal electronically on the last day of the three-month time limit for presenting the claim, but when his representative telephoned the tribunal four weeks later she was told that there was no record of it, and the claim was put in shortly thereafter. The employment tribunal found that, while it accepted that the application form had been submitted to the tribunal website, it had not been received, that an application was not "presented" unless it was physically in a readable format before the tribunal, that accordingly the application had not been presented in time, and that it would not be right to extend time.

JUDGE McMULLEN QC, dismissing an appeal by the claimant, said that the claimant had raised a new point in the skeleton argument which relied on wording in the form which said that when one clicked on the "submit" button the completed form would be sent automatically to the appropriate employment tribunal office. While the appeal tribunal was disinclined to allow the point to be raised, as it would require a view of the employment tribunal as to what was reasonable to be believed, a less technical approach could be taken, because that wording should be read in conjunction with a warning at the very front of the form reminding claimants that strict time limits applied and that it was not guaranteed that the tribunal would receive the form on the same day as it was submitted and to consider an alternative method of delivery if the application was time critical. The employment tribunal could not be faulted when it said that "presented" meant that something actually had to be delivered to the employment tribunal whether physically or in electronic form. If it did not arrive for whatever reason, the claim had not been presented. Those who left their applications to the very last minute ran the risk that something would go wrong. There was no error of law in the tribunal's approach. However, the wording of the form could be made more explicit. There was some force in the suggestion that, since the tribunal encouraged electronic communication and no other form should be submitted at the same time, and since it indicated to the claimant that the pressing of the button would ensure that the matter was transmitted to the appropriate office, a receipt could be generated or some other method indicated so that the claimant would know what had happened. In the present case, the form indicated that there was no guarantee that pressing the "submit" button would mean that the form reached the tribunal on the same date and for that reason the appeal was dismissed, but thought could be given to the way in which the tribunal responded to claims submitted electronically.

Mossman v Bray Management Ltd; 20 December 2004; EAT/477/04
EAT: Judge McMullen QC, Mr A Harris and Mrs M V McArthur

TRANSFER OF UNDERTAKING

Employees, whose employment had been transferred in 1995 to the private sector, following a tendering exercise, and then transferred back to the respondent local authority in 2000, and whose terms and conditions had been governed by a national agreement (the White Book) on the transfer in 1995, complained of unlawful deduction from wages, namely, the failure of their private sector employer to implement an increase in the standard hourly rate agreed following a change in the national bargaining arrangements in 1999. The employment tribunal dismissed the complaints.

JUDGE ANSELL, dismissing an appeal by the employees, said that the first issue was whether the terms of the employees' contracts with the employer, as at the date of transfer, allowed for their pay to be governed not only by the terms of the White Book but by the terms of any subsequent collective agreement which might subsequently be adopted. In 1997 the Green Book had replaced both the White Book, which had dealt with manual workers, and the Purple Book, which had covered other staff, and a new national joint council (NJC) created for all local authority employees. New arrangements reduced the working week for full-time staff which automatically led to an increase in the standard hourly rate. Both parties accepted that the old NJC had power to change the terms and conditions of the White Book and those changes became part of the employee's contract. The employees argued that the changes could also include both handing over power to the new NJC and the acceptance of the new Green Book, both of which thereby became part of the contract. The respondent submitted that without a "bridge" from the individual contract permitting the substitution of a new collective bargain for an old one—for example, by saying that the collective bargain would be "as defined from time to time"—there was no requirement that the employer had to adopt future provisions. There was, in the view of the appeal tribunal, no need to consider the background or context in which the new NJC and/or the Green Book came into existence when the contract of employment was itself clear. The contract only made reference to the old NJC as a negotiating body and only made reference to the White Book as the relevant collective bargain, and without any further reference or incorporation no successor body or successor agreement could be held to be part of the contract of employment. The second issue was whether, in any event, private sector contracted out employees were covered by the Green Book, when the implementation agreement, bringing it into operation, provided by clause 4: "Employees within the scope of the Green Book are all employees of local authorities or other authorities of equal status . . ." Though clause 5 provided: "Where contracts of employment incorporate national agreements, references to the . . . former agreements will now be to the new Green Book", it was clearly governed by the scoping provision of clause 4 and there was nothing to expand its scope to include contracted-out employees. The final issue was whether there would be a necessity for a full-time comparator in the same authority in order for the provisions of the Green Book to apply. The tribunal found that the express terms which provided for a pro rata payment of part-time employees to that being received by equivalent full-time employees could not apply since there were no full-time employees employed by the private sector employer at the time. The appeal tribunal could find no fault in the tribunal's conclusions.

Ackinclose v Gateshead Metropolitan Borough Council; 28 October 2004; EAT/87/04
EAT: Judge Ansell, Mr D Evans and Mr M Worthington

[2005] ICR Part 6

COSTS

At a pre-hearing review an employment tribunal struck out a claimant's claim of unfair dismissal on the ground that it had no reasonable prospect of success since he agreed at the hearing that his employment had been transferred from the respondent to another company by application of the Transfer of Undertakings (Protection of Employment) Regulations 1981. The tribunal refused an application by the respondents for costs, holding that, although the claim was misconceived, it had been genuinely brought and was not frivolous and that the claimant had not acted unreasonably in attending to see whether the tribunal would decide whether the application had a reasonable prospect of success, notwithstanding that the respondent had written to the claimant pointing out his claim was misconceived and warning him that it would be seeking costs.

SILBER J, allowing an appeal by the respondents, said that under rule 14 of the Employment Tribunals Rules of Procedure 2001 a tribunal had an obligation to consider making a costs order where the bringing or conducting of the proceedings was misconceived. That was defined as meaning "having no reasonable prospect of success". The tribunal had been obliged to find that the claim against the respondent was "misconceived". Although, in the circumstances, the employment tribunal had an obligation to consider making an order for costs, it was given a discretion whether or not to do so, and the way in which it exercised its discretion could be the subject of an appeal on a matter of law. Statements in *Benyon v Scadden* [1999] IRLR 700 and *Thorpe v Eaton Electricity Ltd* (unreported) 6 December 2004 showed that a party was at fault if he went to a hearing knowing he was bound to lose, with the result that he should be liable for the costs of the opposing party. That raised the issue of what the claimant knew about the weaknesses of his case. The claimant knew he was employed by another company, and the tribunal was wrong to say that he was not unreasonable in attending the hearing "to see whether the tribunal would decide that [his] application had a reasonable prospect of success". Further, it was not a proper answer to a claim for costs that a misconceived application had been "genuinely brought" because the tribunal had to see if the application was thereafter properly *pursued*. There was clearly force in the point that it did not automatically follow that when an application had been found to be misconceived costs should be awarded, particularly where the prospective party was unrepresented, but the stark fact was that the tribunal had failed to take into account two important factors, namely, that the claimant had been warned at a previous directions hearing that his claim might be misconceived and that he accepted his employment had been transferred. Accordingly, the decision to refuse to award costs was flawed and the matter would be remitted for reconsideration.

Npower v Daly; 23 March 2005; EAT/842/04
EAT: Silber J, Mr C Edwards and Mr P A L Parker

FIXED-TERM EMPLOYEE

On claims, in two test cases, by fixed-term employees that they had been less favourably treated than comparable permanent employees in relation to entitlement to a bonus, the employment tribunal held that time began to run for the claims on 13 November 2002, when the conditions for payment of the bonus were finalised, and not, as contended by the employers, in April 2001 when the employers first announced that a bonus of 5% of annual salary would be paid to permanent staff on completion of the integration of two banking operations, and that it was just and equitable to consider the claims notwithstanding that they had been presented outside the three-month time limit.

JUDGE McMULLEN QC, dismissing appeals by the employers, said that the employers submitted that the claims could not succeed because the employers' "act" took place prior to the coming into force of the Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002 on 1 October 2002; that there was a distinction between the act, in 2001, and the consequence, in 2002, not to make a payment; and that time ran from the former. Though the phrase "cause of action" had been widely used for the purposes of employment proceedings, it was time for modernisation and the appropriate adaptation was "right to complain". It appeared to be common ground that where a discriminatory policy, regime or rule was in place the person affected could complain of its very existence. They could also complain when it was specifically applied in their case. The applicants contended that whatever might have been the applicants' right to complain of the existence of a regime, at least from the date of the implementation of the Regulations, that could not exclude them from the right to complain when the rule was given effect, so as to deny them a bonus when it became payable to comparable employees. In every case the essential question was: what was the discriminatory act; and a tribunal should not take a narrow or legalistic view of the terms in which the complaint was couched. The applicants both claimed that the date on which the action complained of occurred was 18 December 2002. The originating applications appeared to have been drafted with union advice, but the same principle applied, at any rate where agreed facts had been presented to the tribunal. Reference was made to the announcement in November 2001 but not to the announcement in November 2002. No point was taken that the applicants had thereby considered that the 2002 statement was merely a repetition of the 2001 statement or that the applicants were bound by their representation as to the date being 18 December 2002, when the bonuses were paid. That was a correct and helpful stance, and the case had to be decided by reference to more than the originating applications. For the purposes of the present case, "the date of the . . . detriment" was the date when the right given by regulation 3(1) was infringed. The tribunal adopted a very simple approach to the employers' case. It said that, since in April 2001 the Regulations were not in effect, and, further, the applicants were not then employed by the employers, a right to complain did not exist. As to the employers' alternative argument that time began to run on the date each applicant was engaged as a fixed-term employee [October 2001 and February 2002], again, what was done, in taking them into employment on less favourable terms, was not unlawful at that time. No authority had been put forward where the discriminatory act occurred at a time when it was not unlawful, but was implemented at a time when it was. It was not necessary to decide that issue, but it was public policy to give a liberal treatment to threshold conditions in discrimination cases. The tribunal's reasons were replete with distinctions between what was enunciated in 2001 and in 2002. It heard evidence from the employers' officers responsible for policy and employment issues and from a full-time union officer. It was clear that the tribunal regarded the 2001 announcement as conditional and insufficiently detailed, and that that in 2002 indicated a very substantial reconsideration by the employers of the scope of application of the bonus, thus triggering the later operative date. It decided that nothing remained to be done prior to the bonus appearing in the bank accounts of eligible employees on 18 December and, therefore, it rejected the applicants' contention that that was the date of detriment. The appeal tribunal also rejected the employers' contention that the detriment constituting the less favourable treatment was not "on the ground that the employee is a fixed-term employee", relying on the historical separation of their staff between permanent and non-permanent, the latter including fixed-term employees and a range of others. Applying the subjective test required by Lord Nicholls of Birkenhead in *Chief Constable of West Yorkshire Police v Khan* [2001] ICR 1069, para 29, the question was why did the employers decide that the applicants could not receive the bonus. It would be correct to answer by saying that it was because they were members of a group which consisted of fixed-term employees. The fact that other groups were also excluded was not relevant.

Coutts & Co plc v Cure; 17 September 2004; EAT/395/04
EAT: Judge McMullen QC, Mr D Chadwick and Miss G Mills

HEALTH AND SAFETY

An improvement notice served by a Health and Safety inspector under section 21 of the Health and Safety at Work etc Act 1974 alleged that the applicant company had contravened regulation 4(1)(a) of the Manual Handling Regulations 1992 and stated in the schedule that in order to comply with the notice the company should "Provide mechanical aids for use when lifting tyres and wheels on to the tyre changing machine to avoid manual handling" or use "any other equally effective means of complying with the notice". An employment tribunal affirmed the notice, after modifying it by adding the words thereafter: "such as ensuring that adequate training and supervision is in place", stating that it was accepted by the Health and Safety Executive that the direction that the company provide suitable mechanical lifting aids as an alternative to manual handling was not reasonable. The tribunal found that although the Executive was not obliged to set out directions as to measures to remedy breaches, it could have been more specific in acknowledging that a sufficient remedy might be the implementation of proper training and supervision procedures.

EVANS-LOMBE J, allowing an appeal by the company, said that in *Bexley London Borough Council v Gardner Merchant plc* (unreported) 17 March 1993 the Divisional Court, when considering a notice under the Food Safety Act 1990, said: "does the notice enable the recipient to know what is wrong and why it is wrong? The requirement is that the notice should be clear and easily understood." There was no reason why that should not apply equally to notices under the 1974 Act. Any reasonable employer reading the notice together with the accompanying letter would construe it as requiring him to cease manual handling of wheels on to the tyre changing machine and to substitute some sort of mechanical handling device. That the inspector was willing to contemplate, as an alternative remedy, staff training on how manual handling of the wheels should be undertaken could not be read into the schedule or the letter. But it was sufficient to say that to any recipient it would certainly not clearly emerge that such a method of compliance was acceptable. It was submitted by the inspector that the defects in the schedule should not prove fatal to the notice because the statute did not make it compulsory for the notice to contain "directions as to the measures to be taken to remedy any contravention": see section 23(2). But if the relevant statute provided an option to prescribe how the recipient could comply with the notice, and that option was taken, then the specification of how compliance could be effected formed part of the notice and, if confusing, might operate to make it invalid. Once it became apparent to the tribunal that the inspector was not insisting on a mechanical solution to the problem of lifting wheels on to the tyre changing machine, the tribunal should have realised that the notice was fatally flawed and should not have attempted to put matters right by amendment, since it did not properly enable the recipient to know what was wrong, why it was wrong and how the giver of the notice intended that what was wrong should be put right.

BT Fleet Ltd v McKenna: 17 March 2005: [2005] EWHC 387 (Admin)
QBD (Administrative Ct): Evans-Lombe J

TRADE UNION ACTIVITIES

An employment tribunal dismissed a complaint that the claimant's employers were in breach of his right, under section 10 of the Employment Relations Act 1999, to be accompanied at a disciplinary hearing, when they refused him representation at a meeting to discuss a complaint made against him by a fellow employee. It upheld his complaint under section 168 of the Trade Union and Labour Relations (Consolidation) Act 1992 that the employers had failed to allow the claimant time off to attend company council meetings in his capacity as a union representative, but it made no award of compensation under section 172 on the ground that he had suffered no loss of wages.

MR COMMISSIONER HOWELL QC, dismissing the claimant's appeal in respect of his first complaint and allowing his appeal against the refusal to award compensation, said that the first issue depended on whether the meeting that took place was a "disciplinary hearing" for the purposes of section 10 of the 1999 Act. By section 13(4) a disciplinary hearing was a hearing that could result in a formal warning, some other action in respect of the worker by his employer, or the confirmation of a warning issued or other action taken. The claimant submitted that there was nothing in section 13(4) that required the sanction to result directly from the hearing itself and that the definition was wide enough to include meetings which could lead to such a result only after some further process or hearing that might be triggered by what happened at the meeting. Whether a discussion or meeting between management and a worker took on the character of a "disciplinary hearing" within the definition depended on the nature of the meeting itself and not on the description the parties happened to attach to it or its possible consequences: cf *London Underground Ltd v Ferenc-Batchelor* [2003] ICR 656. The Employment Appeal Tribunal in that case referred with approval to the provisions of the ACAS Code of Practice on disciplinary and grievance procedures and observed that there was a difference between informal investigative meetings and hearings as part of a disciplinary process. Whether the point of transformation from simple investigation to the initiation of a disciplinary procedure had or had not been reached in any individual meeting that had started out as a preliminary factual inquiry had to be a judgment of fact and degree for the tribunal of fact. The employment tribunal had not fallen into any error of law in determining that the meeting in question remained on the investigatory side of the line. That part of the appeal was therefore dismissed.

In relation to the second issue, the appeal tribunal had been persuaded that the employment tribunal had taken too narrow a view of the scope of its power to award compensation for what it found to be an unreasonable infringement by the employers of the claimant's rights under section 168 of the 1992 Act. Section 172 empowered the tribunal to make an award of compensation in such a case and required it to have regard not only to "any loss sustained by the employee" but also to the employer's default in failing to permit him to take time off. That section 172 *also* required the tribunal to have regard to any loss the employee could show that he had suffered did not mean that some financial loss or other special injury was the only thing to which regard was to be had in assessing compensation, as the tribunal appeared to have assumed. The word "compensation" in context was wide enough to include the concept of a cash reparation to the individual for the fact that a wrong had been done to him, independently of any special consequential loss he could prove that he had suffered. Even in the context of unfair dismissal, "compensation" was used in that perfectly normal and natural sense in section 118 of the Employment Rights Act 1996. The wording of section 172 of the 1992 Act, in particular the reference to "any" loss sustained, showed that the section contemplated that there night be compensation even in the absence of financial loss. Indeed, where, as in the present case, the employee was made to work his rostered shift instead of attending to union duties the absence of financial loss was likely to be the rule rather than the exception. Tribunals could properly consider whether it was just and equitable to make some reasonable and proportionate award by way of reparation for the wrong done by the employer, without infringing the principle that the purpose had to be compensation to the individual, not the imposition of any form of fine on the employer. The amount of such compensation, if any, was left to the good sense and judgment of the tribunal hearing the evidence. Accordingly, that matter would be remitted for consideration.

Skiggs v South West Trains Ltd; 7 March 2005; EAT/763/03
EAT: Mr Commissioner Howell QC, Mrs M V McArthur and Mr D Welch

EQUAL PAY

In the *Preston v Wolverhampton Healthcare NHS Trust* [2004] ICR 993 litigation, two claims for equal pay, by employees who after being engaged as part-time workers later accepted permanent posts, were struck out by an employment tribunal chairman as being out of time.

JUDGE McMULLEN QC, allowing appeals by the claimants on a preliminary hearing, said that on appeal both claimants contended that the concealment provisions in section 2ZA of the Equal Pay Act 1970 applied to their cases, enabling them to bring a claim long after the six-month period in section 2(4) had expired. On its face, each claim raised a complaint that the claimant was either misled by the employer or was led into a reassurance that she did not need to apply to an employment tribunal. One claimant contended that she had been given a statement in accordance with statutory requirements indicating that her period of continuous employment began in October 1989 and that that period would be recognised for conditions of service, such as pensions. A similar representation in writing had been made to the other claimant, and, in addition, a number of other factual representations appeared to have been made. Those matters indicated that a concealment case could be made at least for the purposes of conducting a full hearing before an employment tribunal. Various passages in *Levez v T H Jennings (Harlow Pools) Ltd* (Case C-326/99) [1999] ICR 521 (see paras 11, 27, 31, 32 and 34) indicated that that case was concerned with deliberate misrepresentations. But, it might be reasonably arguable that a claimant should not be shut out if reassurance was given to her that she needed take no further steps in the case, or if a statutory statement, under section 1 of the Employment Rights Act 1996, indicated that she would have continuity of employment for pension purposes. Such a representation to a woman who had not been eligible to include her previous employment for pension purposes, when she became, as she did in 1995, permanently employed, might well constitute a form of representation covered by *Levez*, and thus article 141 EC, requiring disapplication of section 2(4) of the Equal Pay Act 1970. That being so, the case could be allowed to go to a full hearing; however, an alternative course commended itself, which was that, under *Burns v Royal Mail Group plc (formerly Consignia plc)* [2004] ICR 1103 and *English v Emery Reimbold & Strick Ltd (Practice Note)* [2001] 1 WLR 2409, the tribunal chairman could be asked to consider points made in the documentation which had not been the subject of a reasoned judgment. For the purposes of a strike-out, it had to be assumed that what the claimant said in her correspondence was capable of being made good at a full hearing. The chairman, having recognised that there were concealment cases, had failed to deal with, and to give a judgment on, whether or not the claimants' cases revealed sufficient material to warrant a full hearing or should be struck-out as not disclosing a concealment case. There might also be issues as to whether or not the Equal Pay Act 1970 (Amendment) Regulations 2003 took effect so as to give the claimants such a right at the relevant time. The most effective way of dealing with the matter would be to adjourn and remit the matter for further reasons by the chairman and, if necessary, to come back to the appeal tribunal. The respondents would have an opportunity to respond afresh. The chairman would decide whether he was content for the matter to be dealt with as a strike-out application on the papers, or whether the case should be heard at a full hearing, with all parties represented.

Thacker v Secretary of State for Education and Skills; 30 March 2005; EAT/39 & 40/05
EAT: Judge McMullen QC

PRACTICE

An employee claimed that he had been constructively dismissed unfairly because his employers had been in fundamental breach of his contract of employment by failing to honour a contractual promise to increase his salary. The employee's case was that such a promise had been made to him by the employers' special operations director at the staff Christmas party, whereas the employers denied that there had been any such conversation. The employment tribunal found that, while there might well have been some casual conversation, in the particular environment, the director would not have entered into any legally binding contractual commitment whatsoever, and it dismissed the claim. Dismissing an appeal by the employee, the Employment Appeal Tribunal rejected the employee's submission, inter alia, that the conduct of the hearing had been unfair because it made the finding as to what had been said, which was neither parties' case and which neither party anticipated, without giving the parties the opportunity to make representations about its legal impact.

SMITH LJ, dismissing an appeal by the employee, said that, as a general proposition, it was right that parties should have the opportunity to be heard on any issue likely to be relevant to the decision. It was highly desirable that, if a tribunal foresaw that it might make a finding of fact which had not been contended for, that possible finding should be raised with the parties during closing submissions. If the tribunal did not realise what its findings of fact were likely to be until after the hearing had finished, it would usually be necessary to give the parties the opportunity to make further submissions, at least in writing, though not necessarily by oral argument. However, the giving of such an opportunity was not an invariable requirement, for two reasons. First, rule 11 of the Employment Tribunals Rules of Procedure 2004 gave the employment tribunal a wide discretion on procedural matters, and that discretion seemed wide enough to encompass a decision as to the appropriate course to take where the present kind of situation arose. Secondly, if the legal effect of the findings of fact that were to be made was obviously and unarguably clear, no injustice would be done if the decision was promulgated without giving that opportunity. Even if an opportunity should have been given and was not, the consequence would not necessarily be that an appellate court would set aside the decision. It would only do so if it concluded that the lower court's application of the law was wrong. The main issue on the appeal was whether the employment tribunal's application of the law to the facts that it found was right. The real point was that the tribunal found that the words uttered did not amount to a contractual promise. It was not suggested that the proposition of law set out by the tribunal was not correct, and the tribunal applied it to the facts it found. The conclusion was the inevitable consequence of the findings of fact.

Judge v Crown Leisure Ltd; 21 April 2005; [2005] EWCA Civ 571
CA: Mummery and Smith LJJ and Sir Martin Nourse

TIME LIMIT

A complaint, primarily alleging disability discrimination against the claimant's employer, was posted, in 2002, on the Friday before the Sunday on which time for its presentation expired. It was received at the employment tribunal on the following Monday and was ruled out of time by the tribunal.

BURTON J (PRESIDENT), dismissing an appeal by the claimant, said that in the Employment Appeal Tribunal if a relevant period expired on a Sunday the period for service was extended to the following working day by rule 37(2) of the Employment Appeal Tribunal Rules 1993; and, if that had applied in the employment tribunals, there would have been no issue in the present case. In *Consignia plc v Sealy* [2002] ICR 1193, para 31(4) the Court of Appeal held that if a complaint was sent by first class post, in the ordinary course of post, it would be delivered on the second day after it was posted (excluding Sundays and Bank Holidays, being days when post was not normally delivered); and rule 61 of the Employment Tribunals Rules of Procedure 2004, which came into effect in October 2004, had now put the matter beyond doubt. The claimant sought to challenge *Consignia* by reference to the Court of Appeal decision in *Anderton v Clywd County Council (No 2)* [2002] 1 WLR 3174. What that case did was deal with the position under the CPR, taking a different view of the construction of CPR rule 6.7 from that taken by Brooke LJ in *Consignia*, whose view of the rule was plainly obiter as he was dealing with the Employment Tribunals Rules of Procedure. It was clear, however, that, at best, CPR rule 6.7 was only part of the building blocks for Brooke LJ's very clear guidance to employment tribunals in *Consignia*, which the appeal tribunal was satisfied was both binding and right, while welcoming Brooke LJ's hope, expressed at para 30, that at some stage soon all tribunals should come into line and that the system enshrined in the Employment Appeal Tribunal Rules would be introduced. The appeal consequently failed.

Coldridge v Prison Service; 20 April 2005; EAT/729/04
EAT: Burton J (President), Mr D Chadwick and Mr M Clancy

UNFAIR DISMISSAL

An employment tribunal upheld a claim of unfair dismissal by a claimant managing director who had been dismissed, following a disciplinary hearing, for "gross misconduct" in acquiring a lease of new premises without authority and in failing to follow procedures in respect of cheque signing. The tribunal reached the conclusion that those had not in fact been the reasons for the claimant's dismissal, the real reason being the claimant's failure satisfactorily to inform the chairman, who had already determined to dismiss the claimant, as he had found someone with whom he wanted to replace him. But it found that, in relation to the lease, the claimant had behaved in a foolish and perverse manner and it was just and equitable to reduce any compensatory award by 50%.

MR RECORDER LUBA QC, dismissing an appeal by the employer and a cross-appeal by the claimant, said that the employment tribunal was plainly right to direct itself to the importance of its function in determining what was the reason for dismissal. Where the employer's reason was hotly in contention, as in the present case, the tribunal was entitled to describe the task before it as seeking to identify the "real" reason for the dismissal. For the comprehensive and cogent reasons it gave, the employment tribunal found as a fact that the real reason for dismissal was the underlying resolve of the chairman to be rid of the claimant in order to replace him with someone more to his taste. That, in the tribunal's assessment, was the actual reason for the dismissal. It was true that the tribunal related its assessment of the employer's intention back to the position as it was immediately prior to the discovery of the issue about the lease. In that circumstance, the question for the tribunal was whether the employer's previously unacceptable reason for discharging the claimant had been replaced with a legitimate reason for dismissal. The tribunal was plainly right to ask itself that question. It might well be that in certain cases an employer did resolve to dismiss an employee on specious grounds but was presented, before that opportunity crystallised, with a better or proper ground on which to dismiss. In such cases the question for the tribunal was whether the employer's original intention had been put to one side or overtaken by the opportunity for a legitimate dismissal which had presented itself. It was the employment tribunal that was charged with the responsibility for determining questions of fact of that nature. It was plain it reached a firm conclusion *as a matter of fact* as to the operative reason for dismissal at the time of dismissal. It had not fallen into error in its approach and had asked precisely the right question required by section 98 of the Employment Rights Act 1996. Turning to contribution, the tribunal was faced with a difficult issue: it found that the decision to dismiss was driven by a desire to replace the claimant, but also that the issue of the premises was "a factor in the mind of the employer" and "inextricably linked" to the dismissal by giving the chairman "the excuse he was seeking". The passage in *Robert Whiting Designs Ltd v Lamb* [1978] ICR 89, 92F–H, not only correctly stated the law but was of direct application in the instant case. The appeal tribunal was unable to detect any error in the approach of the employment tribunal and there were no grounds for interfering with its assessment of the contribution at 50%.

BSW Ltd v Brown; 3 May 2005; EAT/835/04
EAT: Mr Recorder Luba QC, Ms J P Drake and Sir Alistair Graham

WAGES

On an employee's claim for unpaid wages, an employment tribunal found that the employee, who had lived in at her employers' hotel, was either working or on call for 132 hours a week, not 36 hours as contended by the employers; and the tribunal made an award for payment for the excess hours at her contractual hourly rate of £4.80, making an allowance for her free accommodation.

JUDGE BIRTLES, dismissing an appeal by the employers and allowing a cross-appeal by the employee in respect of the deduction for accommodation, said that the employment tribunal recorded that the employee's claim was put in two ways: first, that she was not paid, at the contractually agreed rate, for all the hours she worked, or, secondly, that, given all the hours she worked and that she had been paid £9,100 per annum, her hourly pay was below the national minimum wage. Nothing in law prevented the tribunal from approaching the case on either basis, and the tribunal plainly chose to adopt the contractual rather than the national minimum wage approach. In the circumstances it was a permissible option for the tribunal to have regard to cases under the Working Time Regulations 1998 when considering the broad issue of "working time". The tribunal held that when the employee was not actually serving breakfast or dealing with guests she was expected to be in the hotel and was not free to come and go as she chose; that, apart from two hours a day and Mondays, she was on call 24 hours a day; and that that was "working time" within the meaning of the law. The employers' own evidence was that they "needed someone to look after the hotel at night" and that the member of staff had to be "available at night in case there was a problem". The employee could not do as she pleased. She was always on call and could be interrupted at any moment. The appeal would be dismissed. Turning to the cross-appeal, the employment tribunal in fact found that the living-in was a contractual requirement and that the provision of accommodation was not a "perk" but an essential part of the job. On that basis there was no requirement for the employee to give credit for payment for the accommodation. Furthermore, there were no written terms of the contract nor any oral agreement as to any deduction to be made from wages for the use of the room. Having decided the claim on the contractual basis, it was not open to the tribunal to make a deduction for accommodation under the National Minimum Wage Regulations 1999, and the cross-appeal would be allowed.

Vasquez-Guirado v Wigmore; 8 June 2005; EAT/33/05
EAT: Judge Birtles, Mr P R A Jacques and Mrs J M Matthias

COSTS

An employment tribunal upheld complaints of disability discrimination, unfair dismissal and breach of contract by a claimant and awarded compensation of £5,855, but ordered her to pay £10,000 by way of costs to the respondent employer, who had made an offer to settle without admission of liability of £10,000 prior to the hearing and a further offer of £25,000 after evidence had been given.

JUDGE PETER CLARK, dismissing an appeal by the claimant against the award of costs, said that the principles for deciding whether to make a costs order in the employment tribunal included the following. Costs orders in the employment tribunal remained the exception not the rule; however, the question was not whether the case was exceptional but whether the applicant for costs brought the matter within rule 14(1) of the Employment Tribunals Rules of Procedure 2001. Rule 14(1) imposed a two-stage exercise: the tribunal had to ask itself, first, whether the paying party had acted unreasonably; and then, if so, whether to exercise its discretion in favour of awarding costs against that party. Costs were compensatory, not punitive. The rule in *Calderbank v Calderbank* [1976] Fam 93 had no place in the employment jurisdiction. The discretion of the tribunal under rule 14(1) was not limited to those costs that were caused by or attributable to the unreasonable conduct found. Where a party had obstinately pressed for some unreasonably high award despite its excess being pointed out and despite a warning that costs might be sought if persisted in, the tribunal could in appropriate circumstances take the view that that party had conducted the proceedings unreasonably. Where a costs order was appealed, the prospects of success were substantially reduced by the restriction of the right of appeal to questions of law and the respect paid to the exercise of discretion by the tribunal below. Though there was force in the claimant's submission that she was entitled to seek a declaration as to her rights, regardless of the compensation sought or payable, it was never a condition imposed by her for any settlement of her claims that the employer admitted liability. The employment tribunal considered that the claimant's rejection of the improved offer merely confirmed its view, arrived at after a hearing lasting seven days, that she took an intransigent attitude towards negotiations; and, in the judgment of the appeal tribunal, that was a view that was open to the employment tribunal. It was said that the employment tribunal looked at the £10,000 offer in isolation, as if applying the *Calderbank* principle, and failed to take into account other factors including the fact that the claimant had substantially won on liability, her own attempts to initiate negotiations, her entitlement to pursue a declaration as to her rights and the lack of any warning as to her costs risks from the tribunal. That submission was rejected. The tribunal was not in a position to give any warning as to costs, and it took the view that the claimant had simply failed to address the point which had fatally undermined the principal part of her compensation claim, the claim for lost earnings. It was also argued that the employment tribunal failed to connect the unreasonable conduct found to the size of the award, but, to repeat, there was no causal requirement in the exercise of the tribunal's discretion under rule 14(1); and, in any event, the award of £10,000 costs was plainly proportionate to the employer's overall costs of £55,000 incurred after the first offer. The employment tribunal had correctly applied the two-stage test and reached a permissible finding and exercised its discretion within proper limits.

Power v Panasonic (UK) Ltd; 9 March 2005; EAT/439/04
EAT: Judge Peter Clark, Mr B R Gibbs and Mr P A L Parker

DISCLOSURE

In proceedings where the claimant, one of 218 claiming equal pay in the context of a larger claim, claimed that her post had been rated as equivalent to or higher than her comparators under a job evaluation scheme, an employment tribunal chairman, on her application, ordered disclosure of (1) such documents as existed which set out scorings, rankings and bandings, and (2) such documents as identified what had been agreed and what remained to be agreed, in respect of the study, and, having described the categories of documents, the order continued: "recognising that a sifting and editing process may have to take place. This topic may be raised by the parties at a subsequent hearing, if there is a dispute."

WILKIE J, allowing an appeal by the employers, said that the approach envisaged by the Practice Direction contained an important principle, namely, that in order that disclosure should be as much as, but no more than, was necessary for the effective disposal of litigation, a step-by-step approach was often to be preferred. The issue between the parties, essentially, was whether the job evaluation study was valid, and the essential element of validity was whether the parties had accepted its validity. That necessitated looking at the relevant minutes and, potentially, exchanges of correspondence between the parties to what was said to be a valid job evaluation study in order to identify whether in fact they had agreed or accepted the validity of the study. At that stage, scorings, rankings and bandings were not, at any rate at first blush, material that was necessary in order to decide whether there had been an acceptance of its validity. On that basis, if no other, while the second category of documentation ought properly to be disclosed, the first category ought not. But the problem with the chairman's order went beyond that. It was an order for disclosure of documents which left it to the parties, after disclosure had taken place, to identify documents which ought not to have been disclosed, and then, if they disagreed about that category, to go back to the tribunal to determine whether it ought properly to have been disclosed. That was an upside-down way of approaching the question of disclosure and was contrary to the proper adoption of a step-by-step approach. The proper way of ordering disclosure was to order disclosure of the material which at the present stage appeared to be disclosable, then to permit the party seeking further disclosure to identify why it was, if need be from the documentation already disclosed, that a further specific category of documentation ought to be disclosed. The rather odd way of making the order adopted by the chairman might have been his way of responding to an argument put forward concerning the sensitivity and confidentiality of the scorings, rankings and bandings, which had not, according to the employer, fructified into a valid system of job evaluation. But the form of disclosure adopted was an unlawful exercise by the chairman of his discretion in case management. The proper order for the chairman to have made was for him to have ordered disclosure of such documents that identified what had been agreed and what remained to be agreed in connection with the job evaluation study. It was implicit that, if after disclosure had taken place the claimants wished to mount an argument for specific disclosure of further categories of documents, they might do so before the chairman, but having regard to the step-by-step approach; and it would be sensible of them to produce evidence, or perhaps argument in the form of a skeleton, as to why it was that the disclosure already ordered was insufficient for the purpose of disposing of the issues at the hearing.

South Tyneside Metropolitan Borough Council v Anderson: 23 March 2005; EAT/02/05
EAT: Wilkie J

NEGLIGENCE

A claimant who had worked as a motor fitter for the defendant from 1982, regularly using vibrating tools, brought an action in negligence for injury diagnosed as vibration white finger. The judge found that the defendant should have known of the potential risk of vibration white finger in 1975 on the publication of DD43, a draft for development guide to the evaluation of exposure to vibration, and that measures would have had to have been taken which would have meant that by the time the claimant started work conditions would have been such that he would not have developed vibration white finger.

SMITH LJ, giving the judgment of the court allowing in part an appeal by the defendant, said that publication of BS 6842 in 1987 was of far greater significance for employers than DD43, and an organisation of the size and with the resources of the defendant ought, in compliance with its duty to keep reasonably abreast of developments relevant to the welfare of its employees, to have had knowledge of BS 6842 at or shortly after its publication in 1987. Further, it would have been reasonable to have expected the defendant to have investigated the extent of its fitters' exposure to vibration and to have instituted remedial measures within two years of learning of the potential risk. That investigation would have revealed a significant risk and remedial measures could have been taken. Accordingly, a finding that the defendant was liable in negligence to the claimant from 1989 would be substituted. But that decision should not be taken as a finding of general application to fitters working in the transport industry. The defendant contended that the damages should be reduced to take account of the fact that by 1989 the claimant had already suffered some damage, and reliance was placed on *Allen v British Rail Engineering Ltd* [2001] ICR 942. It was now generally accepted that the development of vibration white finger was dose-related and that all exposure to vibration would make a contribution to the eventual development of symptoms. However, the objective of an award of general damages was not to compensate the claimant for the amount of physical damage suffered but the effect that damage had on him. Also different people had different susceptibility to the effects of vibration. Claimant A with high susceptibility might have developed symptoms after, say, five years in the job and they might have increased in severity over the ensuing years. Claimant B with lower susceptibility might not develop any symptoms until after, say, 15 years' exposure, and by the date of trial they might still be mild. If the judge found the employer liable from a date, say, 10 years after the start of employment, Claimant A should on principle receive only such sum as reflected the deterioration in his condition attributed to the exposure after that date. However, it was not always possible to make an appropriate reduction and, if the material was not available to enable even a broad brush approach, the claimant would receive full damages because the negligence had made a material contribution to his condition. Claimant B could properly argue that he should receive full verdict damages (despite some exposure before the date of negligence) because he would never have developed any symptoms if it had not been for the employer's negligence. The present claimant did not develop any symptoms until 1999, about 17 years after his vibration exposure commenced and 10 years after the date his employer should have taken remedial steps. Even then, his symptoms did not become severe. He was in the position of Claimant B, and there was no evidential basis to justify any reduction of his damages to take account of the latent damage he had suffered before 1989.

Brookes v South Yorkshire Passenger Transport Executive; 28 April 2005
CA: Brooke, Smith and Wall LJJ; [2005] EWCA Civ 452

COMPROMISE AGREEMENT

Very shortly before the hearing of a claim of race and sex discrimination, the parties signed a compromise agreement by which the respondent agreed to pay the claimant a sum in full and final settlement of any claim she might have against the respondent. When the claim came on for hearing as listed, it was dismissed by the employment tribunal on the ground that terms of settlement had been agreed, though the claimant's representative asked for an adjournment so the matter could be settled by ACAS.

JUDGE REID QC, dismissing the claimant's appeal made on the ground, inter alia, that the terms of settlement did not comply with section 77(4A) of the Sex Discrimination Act 1975 and section 72(4A) of the Race Relations Act 1976, said that it was submitted that the employment tribunal was obliged to ensure that any settlement complied with the provisions of those sections and that it had erred in law in dismissing the claim on the basis of the settlement having already been reached when it did not comply with the statutory provisions and could not therefore bind the parties. It was pointed out that the overriding objective was to ensure that parties were put on a similar footing and had a fair hearing. Though it was common ground that the terms of settlement did not comply with section 77 of the 1975 Act and section 72 of the 1976 Act, that did not prevent a tribunal dismissing a claim on the basis that the parties had reached agreement. The tribunal had looked carefully at the claim and at the proposed settlement and was content to allow the claim to be dismissed on that basis. It was to be noted that the claimant had not thought it necessary or appropriate herself to attend the tribunal hearing, and in those circumstances it might well have been that the tribunal would in any event have dismissed the claim. There was nothing in law which required an employment tribunal to ensure that the terms agreed were binding within either the Sex Discrimination Act or the Race Relations Act before it permitted a claim to be dismissed when the parties had reached what was otherwise a contractual agreement. On the basis that there was a settlement, albeit not complying with the two Acts, the tribunal was entitled to reach the conclusion it did and there was no error of law.

Mayo-Deman v University of Greenwich; 15 June 2005; EAT/875/03
EAT: Judge Reid QC, Lord Davies of Coity and Mr M Worthington

CONSTRUCTIVE DISMISSAL

An employee resigned by a letter giving two months' notice and citing as the reason for her resignation the intolerable behaviour by members of the employer's staff culminating in an unsupportive action by a manager on that day. She refused to withdraw her resignation but agreed to extend the notice period by two weeks. She made a complaint of unfair constructive dismissal, and at the hearing the employment tribunal concluded, as a preliminary point, that the employee had affirmed her contract by working two months' notice and agreeing to work two extra weeks; and it dismissed the complaint.

JUDGE PETER CLARK, allowing an appeal by the employee, said that under section 95(1)(c) of the Employment Rights Act 1996 an employee was dismissed by his employer if the employee terminated his contract of employment with or without notice in circumstances in which he was entitled to terminate it without notice by reason of the employer's conduct. The legislation had not always allowed for termination by the employee with or without notice. In *Western Excavating (EEC) Ltd v Sharp* [1978] ICR 221, 227, Lord Denning MR said that section 3(1)(c) of the Redundancy Payments Act 1965 had not applied in *Marriott v Oxford and District Co-operative Society Ltd (No 2)* [1970] 1 QB 186 because it only applied where the employee terminated his contract without notice, whereas Mr Marriott had terminated with notice. Today Mr Marriott's case would fall under section 95(1)(c). In the authorities cited by the respondent all the employees had left without notice and the question was whether the employee had delayed too long between learning of the employer's repudiatory breach and leaving the employment, because his act of leaving without notice fixed the date on which he accepted the employer's repudiation. Applying the words of section 95(1)(c) to the present case, the employee terminated her contract with notice. There was no suggestion that she had delayed before giving notice. The "last straw" event she relied on occurred on that very day. She did not delay by giving and working contractual notice. The rationale behind the amendment to the definition of constructive dismissal originally found in section 3(1)(c) of the 1965 Act was that contractual notice once given could not be unilaterally withdrawn by the party giving notice. Thus, subject to withdrawal of notice by mutual agreement, the claimant terminated her contract by giving contractual notice. She did so promptly on learning of the employer's alleged repudiatory breach. The agreement to extend the notice period by two weeks did not affect the question of waiver by affirmation. Far from affirming the contract the employee affirmed her earlier acceptance of the alleged repudiation when she made it clear that she would not withdraw her notice. The parties agreed to a two-week extension of the contractual notice given by the claimant; it was always open to contracting parties to extend or abridge notice provided for under the contract. Technically they were varying the term of contract as to notice. But that agreement could not alter the fact that, for the purposes of section 95(1)(c), the claimant had terminated her contract with notice. Any delay for the purpose of finding affirmation amounting to waiver did not begin on that date but ended on that day.

Owens v Wealdon District Council; 22 July 2005; EAT/186/05
EAT: Judge Peter Clark, Dr Fitzgerald and Baroness Prosser

STRIKING OUT

Complaints by two employees for, inter alia, payment of a lodging allowance were listed for hearing on 26 October 2004 and directions given for, inter alia, the exchange of witness statements by 12 October. The respondent served no witness statements until, on Friday 22 October at 5.50 pm, it faxed two short statements to the claimants' union representative. The latter faxed the employment tribunal on 25 October asking for an adjournment, which was refused, and was told that the matter would be dealt with at the hearing. After speaking to the union representative, the respondent's (in-house) solicitor faxed the tribunal, "consenting" to an adjournment, and saying that, to save wasting costs, the respondent would not attend. On 26 October the chairman directed the respondent's solicitor to attend and subsequently struck out the notice of appearance under rule 18(7)(c) and (e) of the Employment Tribunals Rules of Procedure 2004 on the grounds of unreasonable conduct and failure to comply with directions. The tribunal went on to consider the merits of the complaints, which were upheld, but the respondent was not allowed to participate.

JUDGE SEROTA QC, allowing an appeal by the respondent, said that it was clear from the authorities that, save in cases where there had been a breach of an order or rule and where the default could be regarded as being wilful, deliberate or contumelious disobedience of the order of the court, a court or tribunal should not strike out a case by way of punishment but should always ask whether a fair trial could be achieved. In the present case, when the tribunal said that a fair trial could not be achieved "today", it was saying that it would not be possible for the respondent's witnesses and the claimants' witnesses to be heard on that day in view of the relatively limited time available, two hours having been lost and time spent considering a strike out. Also, albeit the conduct of the respondent and its solicitor might be categorised as unreasonable, the tribunal did not categorise it as wilful, deliberate or contumelious. Though it was possible to strike out a notice of appearance for breach of an order, such as the order to serve witness statements, without reference to the possibility that a fair trial might still be had, that was always a relevant consideration in the exercise of the discretion of the employment tribunal; and, in any event, was a matter required to be considered by reason of the overriding objective. Employment tribunals should not be so outraged by what they saw as unreasonable conduct as to punish the party in default in circumstances where other sanctions could be deployed and a fair trial was still possible. The employment tribunal was also required, on whatever basis it made its order, to consider issues of proportionality. Had it done so, it would have concluded that the prejudice to the claimants was minimal, having regard to the fact that the witness statements added little to what was already in the notices of appearance. Where a notice of appearance was struck out, the respondent would not be entitled to participate in the proceedings at all. The tribunal should have recognised that that was a wholly disproportionate sanction and that the matter could have been dealt with by simply denying the respondent the right to call any evidence, leaving them entitled to cross-examine the claimants, put documents to them and make submissions. Accordingly, a rehearing would be directed at which the respondent would be debarred from calling evidence.

Laing O'Rourke Group Services Ltd v Woolf; 6 May 2005; EAT/38/05
EAT: Judge Serota QC, Mr P Gammon and Mr G H Wright

TRANSFER OF UNDERTAKING

An employment tribunal upheld an employee's complaint, against the transferee in a TUPE transfer, that the transferee had failed to provide the transferor with information required by regulation 10(3) of the Transfer of Undertakings (Protection of Employment) Regulations 1981, so as to enable the transferor to carry out its obligations to affected workers under regulation 10(2)(d).

JUDGE McMULLEN QC, allowing an appeal by the respondent transferee, said that the transferee contended that the tribunal had not addressed the central issue in the case, namely the transferee's response that it was not liable to the claimant under the regulations as it was not the claimant's employer. The transferee was correct. There was no individual right to complain by an affected employee, which the claimant was, when a transferee failed to provide the information to a transferor which was envisaged by the combination of regulation 10(2)(d) and regulation 10(3). The proper mechanism for bringing a transferee into proceedings where it was alleged that the transferee had failed to provide information pursuant to regulation 10(3) was by joinder. That was why it was often necessary to constitute proceedings against the transferor and the transferee, or to rely on the transferor to bring in the transferee as a second respondent, but it depended on the claimant issuing proceedings against the transferor at the outset. The claimant had constituted the proceedings solely against the transferee. Thus the central issue for the tribunal ought to have been to resolve the issue raised by the notice of appearance which indicated that the transferee's position was that it was not the proper respondent. The tribunal failed to resolve that issue, which was one going to jurisdiction.

MITIE Group v Mullineaux; 24 February 2005; EAT/708/04
EAT: Judge McMullen QC, Mr J Hougham and Mr P Smith

CONSTRUCTIVE DISMISSAL

An employee resigned after his employer suggested that he might undertake a lesser role on his return to work following four months absence because of depression. On his complaints of unfair dismissal and disability discrimination, the employment tribunal found that the employee had been pressured into taking a lesser role on his return to work and that with reasonable adjustments he would have been able to continue his work, but the tribunal also found that the employer did not want to get rid of him. The tribunal held that, while the employee's contract was not undermined by any conduct on the part of the employer sufficient to enable him to leave on account of it, he was discriminated against on the grounds of disability without justification, and it dismissed the unfair dismissal complaint and upheld the complaint of disability discrimination.

JUDGE SEROTA QC, allowing an appeal by the employee, said that in *Meikle v Nottinghamshire County Council* [2005] ICR 1 the Court of Appeal held that a failure by an employer to carry out reasonable adjustments in relation to a person who was disabled amounted to a fundamental breach of the obligation of trust and confidence and that, as the employee had resigned in response, at least in part, to those fundamental breaches of contract, she had been constructively dismissed. In the present case the employment tribunal found unequivocally that there had been a serious breach of the obligation on the part of the employer over a period of time to make reasonable adjustments as it was obliged to do under the Disability Discrimination Act 1995. It might be that there were circumstances in which there could be a breach of the obligation to make reasonable adjustments which might not be regarded as repudiatory, but, given the findings made by the tribunal, there was no way in which the employer's conduct could be regarded as anything other than repudiatory; and the tribunal gave no explanation as to why it did not so regard it. Accordingly, the tribunal fell into error in failing to characterise the breach of contract as repudiatory and it should, on the findings of fact it made, have concluded that the employee's case of unfair dismissal was made out.

Greenhof v Barnsley Metropolitan Borough Council; 5 August 2005; EAT/286/05
EAT: Judge Serota QC, Mr A Harris and Mrs J M Matthias

DISCLOSURE

On an employee's complaint that she had been constructively dismissed unfairly, in that her employer had failed adequately to investigate her allegations of harassment against one of her superiors, an employment tribunal chairman ordered disclosure by the employer of documents relating to the internal grievance and appeal procedure, including interview notes and witness statements.

JUDGE SEROTA QC, dismissing an appeal by the employer, said that the principal ground on which the employer had objected to the disclosure was that the employee knew that, under the employer's harassment procedure, at all stages her complaint would be handled in strict confidence and that confidentiality would be maintained throughout, even when the investigation was completed. The chairman had correctly directed himself, by virtue of his power to manage proceedings under rule 10 of the Employment Tribunals Rules of Procedure 2004, that disclosure should be ordered if it was necessary to ensure a fair trial of the action. Where confidentiality was claimed the tribunal had to balance the parties' interests and the confidentiality of the documents against the interest of the other party in seeing documents which might assist his case. He directed himself that an examination was necessary as to whether there was any prima facie prospect of the confidential material being relevant to an issue which arose in the litigation. If it was reasonable to expect that there was a real likelihood or relevance emerging from the examination, it was a question of convenience whether or not the examination should take place at the interlocutory stage of discovery or immediately the matter arose at trial. Having directed himself as to the law, the chairman weighed up the points on both sides, he then read the documents, and, having done so, expressed his opinion that it was necessary for disclosure to take place for there to be a fair trial. It was clear that he considered that the documents were relevant. The employer's submission on the appeal was really to the effect that the claimant had failed to make out a proper case for disclosure of the documents as they were not relevant and the specific confidentiality when measured against their relevance militated against disclosure. The short answer to that was that the chairman had not misdirected himself as a matter of law and his exercise of discretion was not flawed so as to give any reason for interfering with his order.

National Probation Service, Teeside v Devon; 3 August 2005; EAT/419/05
EAT: Judge Serota QC (sitting alone)

FAIR HEARING

On a complaint of unfair dismissal by an employee who had been dismissed when she refused to accept new terms of employment, the employer sought to justify the dismissal on the basis of some other substantial reason in that the financial pressures on the employer prevented it from maintaining the employee's existing contract of employment and she had unreasonably refused the offer of new terms and conditions. When, at the hearing, the employee's husband, who was presenting her case, started to cross-examine the employer's witnesses in relation to the company's accounts to try and show that the suggestion that the company was running at a loss was not made out, the chairman intervened, saying that questioning on financial matters might assist the employer, as the employer had elected not to offer any financial evidence and so was not able to rely on a financial case to justify the dismissal. The employee's husband did not continue with his questioning, but, when the tribunal gave its reasons for dismissing the complaint, it said that it accepted the evidence of the employer's witnesses that the employer was in severe financial difficulty and had to make significant economies to survive.

JUDGE ANSELL, allowing an appeal by the employee, said that the question was whether an impartial observer, looking at what had happened, would conclude that, by reason of the chairman's intervention, the employee's husband was effectively deflected and persuaded not to pursue a line of questioning which was relevant to an issue in the case. Clearly, one of the key issues in the case was the financial state of the company and its reasons for taking the decision to alter the terms of the certain employees, and it was appropriate for the claimant employee's husband to put some questions about the accounts. The fact that he did not pursue his questioning was understandable in the context of the assurance he believed he had received. Certainly an outside observer would say that there had not been a fair hearing and that the employee had been effectively deprived of pursuing what was an important line of cross-examination. It might well be that at the end of the day the employer would have established the case the tribunal found had been established, but, on the way to establishing that case, there certainly had to be a fair procedure and the appeal tribunal was not satisfied that that was followed in the present case. The only course was to set aside the decision and for there to be a rehearing on the issue of whether or not the employer did establish a substantial other reason for the dismissal.

Moir v Heart of England Housing and Care Ltd; 15 August 2005; EAT/918/04
EAT: Judge Ansell, Mr D Evans and Sir Alistair Graham

NATURAL JUSTICE

An employment tribunal upheld complaints by three employees that their dismissal on the ground of redundancy was unfair, finding that the employer had simply decided who was to be made redundant and produced evidence of scores for various criteria after the event in an attempt to justify the dismissals.

RIMER J, allowing an appeal by the employer, said that the sole ground of appeal was that the tribunal had arrived at its decision by an unfair process in that, in finding the dismissals to have been substantively unfair, the tribunal relied to a material extent on a finding of fact in relation to which the employer was given no opportunity either to call evidence or to make submissions. It was said that it was not part of the employees' case that the scores had been produced after the event to justify conclusions arrived at without the benefit of any objective selection method, and that it was not put to the employer's witnesses in cross-examination and formed no part of the employees' submissions; yet it had been central to the tribunal's decision. Comments from the chairman amounted to an acceptance that at no point did anyone put it to any witness that the scores had been fabricated after the event. It was obviously contrary to ordinary principles of natural justice to make a finding against a party without that party first being given the opportunity to deal with and meet the point. As the employees submitted, if the remission of their complaints to a freshly constituted tribunal for rehearing would inevitably lead to the making of the same decision, then in principle it would be wrong to remit them, even if the employment tribunal had made a serious error in its handling of the case. But, while the appeal tribunal could not be confident that the outcome would be different, it was not inevitable that it would be the same. In arriving at its decision the tribunal made a finding of dishonesty against the employer and its directors in circumstances of manifest unfairness. The tribunal had placed apparent reliance on a crucial finding arrived at in a manner which was contrary to basic principles of natural justice. Once it was accepted, as it was by the appeal tribunal, that that finding either did play or might have played a material part in the tribunal's overall decision-making, it inevitably followed that the decision must be set aside and the matter remitted for rehearing.

Polyglobe Group Ltd v Vadher; 3 August 2005; EAT/11/05
EAT: Rimer J, Ms K Bilgan and Mr J Mallender

PROTECTIVE AWARD

A company with two production sites decided to consolidate production at one new site, plans being well advanced by a board meeting held on 5 January 2004. On 18 February 2004 the claimant union were informed of the decision and that it necessitated, at one site, an initial redundancy of 90 to 95 employees with the remainder being redundant in November 2004. The first employees were made redundant on

12 April. The union sought a protective award for the employer's failure to consult in accordance with section 188(1) of the Trade Union and Labour Relations (Consolidation) Act 1992. The employment tribunal found that the employer had had a clear proposal to consolidate for some considerable time and that the proposal to make the employees redundant had been reached at the latest by 5 January; that, although there was some discussion regarding the mitigation of the consequences of the dismissals, there was no meaningful consultation on avoiding, or reducing the number of, dismissals; and it made an award of 70 days.

JUDGE ANSELL, dismissing an appeal by the employer, said that, while the employer did not challenge the finding that the obligation to consult arose by 5 January 2004, it contended that the tribunal had criticised the employer for failing to give the union the opportunity to consult about the reasons for proposing redundancies and all the economic background or context in which the proposals had arisen, whereas the employer was not obliged by section 188 to consult about those matters, which had been decided on by the beginning of January, and the meaningful consultation involved the consequences of the decision to move production, which consultation did take place after 18 February, some 52 days before the first dismissal. In *Susie Radin Ltd v GMB* [2004] ICR 893, the Court of Appeal held that the futility of consultation was not relevant to the making of a protective award. Once the tribunal had selected 5 January as the trigger date, and established the facts in terms of the commercial decisions that had actually been taken by that date, it was entitled to take the view that there could still be meaningful consultation in relation to either avoiding or reducing the number of dismissals as a consequence of those decisions. The tribunal was entitled to form the view that that was a wholly different situation from that which existed by the middle of February by which time the new site had become a fait accompli and consultation became meaningless. Consultation in January might have been futile but that did not provide a defence to the need for such consultation. Finally, it was said that the level of the award was excessive. The appeal tribunal did not agree. The employment tribunal had adopted the approach set out in *Susie Radin*, namely that, in a case where there had been no consultation, one started with the maximum period and reduced it only if there were mitigating circumstances. Peter Gibson LJ also made it clear in *Susie Radin*, at para 45, that the employment tribunal had a wide discretion to do what was just and equitable.

Cranwick Country Food plc v GMB; 6 September 2005; EAT/225/05
EAT: Judge Ansell, Ms V Branney and Mrs R A Vickers

UNFAIR DISMISSAL

An employment tribunal upheld a complaint of unfair dismissal by a bank employee who was dismissed for gross misconduct after she accepted incorrect forms of identification when opening a new bank account. The bank's disciplinary procedure stated that gross misconduct was "any deliberate act committed which is . . . detrimental to the conduct of the business . . ." and provided examples in appendix B, which included "serious breaches of regulatory . . . rules". In response to the contention by the employer that the employee had contributed to her dismissal, the tribunal said: "the tribunal has concluded that the dismissal was substantively unfair for the reasons stated and therefore the claimant did not contribute to her dismissal and no such reduction should be made for contributory fault."

JUDGE McMULLEN QC, on an appeal by the employer, said that the question before the tribunal was whether every example within appendix B required to be the subject of a finding that it was a deliberate act. The tribunal came to the conclusion that the correct construction of the documents was that it did and went on to find that the employer had insufficient material to form a conclusion adverse to the employee on deliberateness. It held that the employer failed to carry out sufficient investigations and that, if it had done, it might well have come to the conclusion that its own procedures were not being followed and that the claimant employee was simply one of a number of employees making similar "mistakes". The charge put against the claimant was of serious breaches of the compliance requirements under the FSA. Even without dedicating a specific construction, the use of the words "serious breaches" connoted that the claimant had done something deliberately wrong; but, in any event, an employee subject to that regime was to be guilty of gross misconduct only if the serious breaches of the FSA requirements were the result of any deliberate act committed by the employee. Such confusion and ambiguity as was found to exist within the regime had to be construed against the maker of the document. What the document indicated was that the employer would take very seriously, and visit with dismissal in appropriate circumstances, matters which were the subject of deliberate action. The tribunal's decision as to construction would be upheld; and there was no error in the tribunal's approach to the essentially fact-finding matter of whether the decision to dismiss the claimant fell outside the band of reasonable responses of a reasonable employer. On the issue of contribution, however, the tribunal made an error. First, it failed to explain its reasons for deciding against the respondent's contention that there should be contribution; and the linkage between the substantive unfairness and *no* contribution was an error. Many cases which were substantively unfair invoked the jurisdiction of the employment tribunal under section 123 of the Employment Rights Act 1996 to reduce compensation by reason of the claimant's contribution. Indeed, it was more likely to be in such cases, rather than in cases of procedurally unfair dismissal, that the tribunal would find a contribution. In a procedurally unfair dismissal, it usually involved the employer failing to carry out some objectively required reasonable step of investigation which really was a matter in the hands of the employer. It was unlikely, but not impossible, that contribution would apply in such a case; but where, as in the present case, an issue of contribution was raised, it should be dealt with. The case had to go forward to a remedy hearing and there would be an opportunity, therefore, for a submission to be made on the basis of contribution.

Abbey National plc v Kaur; 3 August 2005; EAT/271/05
EAT: Judge McMullen QC, Mr M Clancy and Mrs A Gallico

DISABILITY DISCRIMINATION

An employment tribunal upheld complaints of discrimination, contrary to section 5(1)(a) and (2) of the Disability Discrimination Act 1995, by an employee, who suffered from a psychiatric condition but, when employed, had refused to provide any information about long term health conditions, or to permit the employers to contact her doctor. The employee had been dismissed for failure to comply with the employers' standards of behaviour by repeatedly refusing to comply with reasonable requests and acting in a rude and threatening manner. The tribunal found that the employers had had constructive knowledge of the employee's disability and had therefore been unjustified in treating the employee less favourably and in failing to address the possibility of making reasonable adjustments, though, as the employee had decided not to take medication for her disability, whatever reasonable adjustment had been made would have made no difference.

JUDGE BIRTLES, dismissing an appeal by the employers, said that the employment tribunal had made adequate findings of fact to justify its conclusion that the employers were fixed with constructive notice of the employee's condition, and that was an issue of pure fact. The employers next submitted that the tribunal had failed to direct itself as to the proper meaning of reasonable adjustment under section 6 of the Disability Discrimination Act 1995, and that the question was whether there could be a failure to make a reasonable adjustment which would not have worked because the employee would not take her medication. The appeal tribunal agreed with the analysis of the employment tribunal that, given that the question under section 6(1)(a) was to consider whether the arrangements made placed the employee at a substantial disadvantage in comparison with persons who were not disabled, the duty was on the employer to address his mind to those matters illustrated in section 6(3), and that it would be very difficult for an employer to justify a failure to take reasonable steps if he had not considered what steps should be taken. Once the tribunal had made the finding of fact that the employers did not take any steps in relation to the making of reasonable adjustments, and were therefore in breach of their duty under section 6, it was not necessary for it to make a finding as to whether such failure was justified. Having found that the employers were fixed with constructive knowledge of the employee's condition but that they had taken no steps to consider reasonable adjustments, justification became irrelevant.

Department of Work and Pensions v Hall; 31 August 2005; EAT/12/05
EAT: Judge Birtles, Mr C Edwards and Mr D Smith

HOLIDAY PAY

An employee's ("zero hours") contract of employment provided that his holiday pay was to be based on his average earnings over the 12 weeks prior to his holiday. In calculating his holiday pay the employer excluded holiday pay received by the employee from the previous 12 weeks' earnings. An employment tribunal upheld his claim for unlawful deduction from wages.

JUDGE PETER CLARK, dismissing an appeal by the employer, said that the question was whether, in calculating the employee's earnings over the 12 weeks prior to taking the relevant holiday, holiday pay received during that period ought to be counted as "earnings", as the tribunal held. The employer's argument was that if it was included the employee would receive a double benefit; and that the employer had always excluded holiday pay from its calculations. The employer argued, further, in reliance on *Secretary of State for Employment v Haynes* [1980] ICR 371, that remuneration under section 224 of the Employment Rights Act 1996 did not include holiday pay, and therefore could not, on a proper construction of the contract, applying the principles laid down by Lord Hoffmann in *Investors Compensation Scheme v West Bromwich Building Society* [1998] 1 WLR 896, be included in the term "earnings". It seemed to the appeal tribunal that the employment tribunal had been perfectly entitled to construe earnings as including holiday pay. It was significant, on the facts, that in calculating average earnings the employer include, among other payments, maternity and paternity pay, sick pay and adoptive leave pay. Applying Lord Hoffmann's test, the expression "earnings" would convey to a reasonable person, with the necessary background knowledge at the time the contract was entered into, that it included all payments made to the employee under the terms of the contract. That would include holiday pay. The fact that in practice the employer did not include that form of pay did not alter the meaning of the word in the contractual term, particularly where no logical distinction was advanced between holiday pay and, for example, sick pay. The double benefit argument did not arise once it was accepted that holiday pay was part of the employee's earnings. *Haynes's* case was concerned with the statutory expression "remuneration" in the context of a normal hours contract, now covered by sections 221–223 of the Employment Rights Act 1996, and was not authority for the general proposition that holiday pay did not fall within the meaning of remuneration, particularly as that expression was understood as a result of section 224. Remuneration was not defined in the Act. If the employer wished to reflect precisely the statutory definition under regulation 16 of the Working Time Regulations 1998, it was open to it to use the expression "remuneration" instead of "earnings", or to exclude holiday pay expressly from the calculation. However, had the employer done that, it might then have fallen foul of the requirements of regulation 16.

Manpower UK Ltd v Vjestica; 18 October 2005; EAT/397/05
EAT: Judge Peter Clark

MATERNITY LEAVE

An employment tribunal upheld a complaint of unfair dismissal, under section 99 of the Employment Rights Act 1996 and regulation 20(1)(b) of the Maternity and Parental Leave etc Regulations 1999, by an employee who became redundant while on maternity leave, because she had not been offered suitable alternative employment which was available. The tribunal also found the dismissal to have been unfair in relation to the consultation process, inter alia, because of a failure to advise her that consultation could be extended to the end of her maternity leave.

JUDGE ANSELL, allowing an appeal by the employer, said that the appeal tribunal was concerned by the tribunal's view that the consultation period would be automatically extended by virtue of the maternity leave. The approach of the tribunal, in relation to regulation 10 of the 1999 Regulations, should be, first, to consider whether it was practicable by reason of the redundancy for the employee's current employment to continue, which involved the employer satisfying a tribunal that it was necessary to implement the redundancy during the period of maternity leave. The tribunal would then have to determine when the existing contract of employment would be terminated and determine whether a suitable alternative vacancy was available prior to the termination. The employer conceded that it could be argued that the normal consultation period might have to be extended because of special circumstances involved in the employee's maternity leave. However, in the absence of any specific finding that the need to implement the redundancy could be postponed until the employee returned to work, it could not be accepted that the proper interpretation of regulation 10 meant that the consultation period during which time suitable alternative vacancies could be considered was automatically extended until the employee returned to work. The tribunal's error regarding the extension of the consultation period might well have clouded its view regarding the reasonableness of the employer's approach to one possible vacancy. The tribunal also erred, bearing in mind the issues in the case, in ruling that the employer was not entitled to cross-examine the employee about her childcare arrangements generally. The employer next complained of the way the tribunal had dealt with the issue of suitability of an alternative vacancy for the purposes of regulation 10, where the tribunal had said that it was a decision entirely for the employee. Vacancies might arise either because they were suggested by the employer, in which case the employee's reasons for refusal would have to be judged by the tribunal, or the employee would suggest a job and the employer's refusal or conditional acceptance would have to be judged in the light of the statutory tests. To suggest, however, that the decision was "entirely for herself" omitted the tribunal's role in assessing whether or not the employee's decision was reasonable in all the circumstances. Finally, there was a complaint by the employer of bias; and a schedule of allegations of bias had been prepared incorporating also the response of the chairman and members of the tribunal. The suggestion from the chairman that both sides had been treated in the same way was simply not made out by close analysis of the interventions that took place, and the partiality shown might have had an impact on the tribunal's view of the central issue in the case, namely that of suitable alternative vacancies. The case would be remitted for rehearing before a different tribunal.

Calor Gas Ltd v Bray; 12 September 2005; EAT/633/04
EAT: Judge Ansell, Ms K Bilgan and Mr B M Warman

STRIKING OUT

An employment tribunal chairman, pursuant to rules 10(2) and 13(2) of the Employment Tribunals Rules of Procedure 2004, ordered claimants complaining of unfair dismissal to serve a list of documents and witness statements by a certain date, failing which their claims would be struck out. The claimants did not comply, and when the case came on for hearing the employment tribunal held that the claims had been struck out on the date specified in the chairman's order and it had no power to consider the matter.

JUDGE PETER CLARK, allowing an appeal by the claimants, said that the question was whether the chairman's order operated so as to preclude the tribunal from further considering the claimants' claims. On its face rule 13(2) provided for an automatic strike-out without more in the event of a party's non compliance with an order of the type listed under rule 10(2), and there was no reason to take rule 13(2) at anything other than face value. The question remained, however, as to whether the tribunal was functus officio following the expiry of the time for compliance with an order to which the conditional rule 13(2) sanction was appended. The first part of the chairman's order fell within the definition of an "order", as opposed to a "judgment", contained in rule 28(1)(b). The issue was the status of the rule 13(2) "unless" part of the order. The claimants submitted that, although conditional, it was a "judgment" within the meaning of rule 28(1)(a). The respondents challenged that construction, submitting that the rule 13(2) element was part of an "order" made by the chairman, not being a judgment. In the view of the appeal tribunal, a rule 13(2) "unless" order amounted to a conditional judgment. It became a final determination of the proceedings if the party failed to comply with the underlying order. Consequently, it was reviewable under rule 34, and the tribunal was not functus officio. It had power to review a strike-out order taking effect under rule 13(2) in the same way as strike-out orders made under rule 18(7) or rule 20(4). Alternatively, if an "unless" order made under rule 13(2) was an order and not a judgment, it was susceptible of variation under rule 10(2)(n), notwithstanding that the time for compliance had expired: see rule 10(2)(e). Following the expiry of the time for compliance, the strike-out sanction took effect. Thereafter it was open to the party in default to apply for a review of the strike-out judgment, coupled with an application to extend time for compliance with the underlying order requiring him to do or not to do something—in the present case, to serve a list of documents and witness statements. The case would be remitted for consideration of any application by the claimants for review of the strike-out order.

Uyanwa-Odu v Schools Offices Services Ltd; 5 October 2005; EAT/294/05
EAT: Judge Peter Clark, Ms V Branney and Mr G Lewis

GRIEVANCE PROCEDURE

On 3 December 2004 the claimants wrote to their employers complaining about their working conditions, alleging breaches of their contracts of employment and terminating their employment. On 15 March 2005, after the expiry of the three-month period prescribed by article 7(a) of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 for bringing such a claim, the claimants presented claims for breach of contract. On a pre-hearing review to determine whether the claims were out of time, an employment tribunal chairman found that by sending the letter of 3 December 2004, within the three-month period, the claimants had complied with paragraph 6 of Schedule 2 to the Employment Act 2002, in that they had set out a grievance in writing, and that, accordingly, regulation 15(1)(b) of the Employment Act (Dispute Resolution) Regulations 2004 applied to extend the three-month time limit for a further three months.

JUDGE PETER CLARK, dismissing an appeal by the employers, said that the starting point when looking at the 2004 Regulations was regulation 2, the definition regulation, to which the chairman's attention did not appear to have been drawn. That provided: "'grievance' means a complaint by an employee about action which his employer has taken . . . in relation to him; 'grievance procedures' mean the statutory procedures set out in Part 2 of Schedule 2; 'modified grievance procedure' means the procedure set out in Chapter 2 of Part 2 of Schedule 2." Neither the chairman nor the parties below addressed the question posed by regulation 6: did either the standard or modified grievance procedure apply on the facts? The chairman thought that it was sufficient that the claimants raised a grievance about an action by the employer that could form the basis of a complaint by an employee to an employment tribunal under the 1994 Order. It was plainly not as simple as that. First, the tribunal had to be satisfied that one or other of the statutory grievance procedures applied, and, in particular, whether they were excluded by regulation 6(4)(5) or (7). The chairman appeared to have proceeded on the basis that the standard grievance procedure applied. That was the basis on which the case was put before him by the parties, and the point was not taken in the notice of appeal. The first question raised by the notice of appeal was whether the chairman was wrong in law in failing to consider and construe the provisions of Part 4, paragraph 15 of Schedule 2 to the 2002 Act. In the view of the appeal tribunal, paragraph 15(2) was concerned only with claims under Part IVA of the Employment Rights Act 1996, i e whistle-blowing claims, and did not apply to the present claim under the 1994 Order. The second point concerned whether the claimants' letter of 3 December 2004 complied with the requirements of paragraph 6 of Schedule 2, i e had the claimants set out a grievance in writing and sent a copy of it to the employer? Any contractual grievance procedure was not to the point; the question was whether under the statutory grievance procedure step one had been made out. The chairman had been perfectly entitled to find that it had: the letter was a complaint by employees about action which the employer had taken in relation to them within the meaning of regulation 2(1) of the 2004 Regulations. It was hoped that parties, their advisers and tribunals would be alert in future to the potentially complex issues raised by regulation 6, which had not been raised in the present case.

Thorpe v Poat; 18 October 2004; EAT/503/05
EAT: Judge Peter Clark

WORKER

An employment tribunal rejected a claimant's complaint of unlawful deduction from his wages on the ground that he was not a "worker" within the definition in section 230(3) of the Employment Rights Act 1996. The claimant, a self-employed commercial agent, had left his employment with the respondent company in 1997 and entered into a sales agency agreement with the company whereby he received commissions based on sales achieved by him in his designated area, which were paid without deduction of income tax or national insurance. He undertook work for other principals, but in September 1999 he agreed to stop working for one of them and not to take on any more agencies or expand existing ones and was paid a retainer of £8,500 per annum by the respondent company. When the retainer was terminated in June 2004, the claimant lodged his complaint.

JUDGE ANSELL, allowing an appeal by the claimant, said that the core of the claimant's appeal was that the tribunal failed to deal properly with the issue of whether or not he acted in the capacity of a business undertaking of which the respondent was the customer within paragraph (b) of section 230(3). Criticism was made of the guidance in *Byrne Bros (Formwork) Ltd v Baird* [2002] ICR 667, para 17, particularly subparagraph (5) and the criteria for determining whether a person operated as a worker or as a business undertaking, and it was submitted that the focus should be on whether or not the alleged worker was operating a business undertaking with customers and that, in particular, it was necessary to look at the degree of economic dependence between the parties. The respondent submitted that the tribunal should not be criticised for following the guidance in *Byrne*, namely to determine whether the claimant was or was not in a "subordinate and dependent position vis-a-vis the respondent" or in a "sufficiently arms length and independent position and able to look after himself in the relevant respects". Moreover, it was pointed out that the tribunal made a specific finding that "the respondent, like the claimant's other principals, was more of a client or customer than an employer"; and it was contended that, while economic dependence might be one factor, it was important to consider the overall control involved in the relationship to determine the degree of subordination or dependence between the parties. The appeal tribunal agreed with the respondent's submissions. The essential task for the tribunal was to determine the level of control and dependence, including economic dependence, between the parties judged by numerous factors including those set out in *Byrne* at para 17(5). An additional important factor in the present case was that the claimant acted for more than one principal, although it would be necessary to examine the relationship between the agent and each principal particularly as there was a predominant principal. The claimant then contended that the tribunal had failed to consider carefully the precise terms of the agency agreement, thereby failing to follow the guidance in *Byrne*. The appeal tribunal was concerned that the tribunal's failure to give closer attention to the precise terms of the agency agreement had led to two important errors in its fact finding. It was incumbent on the tribunal to carry out some analysis of the written agreement in order to determine what degree of dependency and control that contract imposed. Far more important, however, was the tribunal's failure to consider the effect of the change of arrangements in 1999 in relation to the payment of retainer and most importantly the imposition of the condition that the claimant would not take on any more agencies nor expand existing ones. That was a significant alteration in the nature of the relationship between the parties that might have had some bearing on the tribunal's conclusions in relation to control and dependency. The case would be remitted to a fresh tribunal for rehearing.

Giannelli v Edmund Bell & Co Ltd; 6 September 2005; EAT/192/05
EAT: Judge Ansell, Ms K Bilgan and Mr J Hougham

CONTRACT OF EMPLOYMENT

An employee, who had no written contract of employment, resigned following a period of sick leave during which she received statutory sick pay but no contractual salary. An employment tribunal dismissed her claim of unfair constructive dismissal on the grounds that there was insufficient evidence that it was a term of her contract that she would be paid her full salary during any period of sickness absence and that she had decided to leave for other reasons.

JUDGE RICHARDSON, allowing an appeal by the employee, said that the first issue was whether there was a term of the employee's contract of employment entitling her to be paid when absent through illness. If so, there was without doubt a breach of that term. Whether failure to pay the employee when absent caused or contributed to a breach of the implied term of trust and confidence or was in itself repudiatory would also be matters for the tribunal to consider. It did not appear that the tribunal had cited to it any authority on the question of pay during sickness absence. The leading modern case was *Mears v Safecar Security Ltd* [1981] ICR 409, 418, in which, in the Employment Appeal Tribunal, Slynn J said: "the proper approach is to look at all the facts and the circumstances to see whether a term is to be implied that wages shall or shall not be paid during periods of absence through sickness. Such a term as the cases show may be implied from the custom and practice in the industry. It may be implied from the knowledge of the parties at the time the contract is made . . . the right approach is to ask, on all the facts and circumstances of the case to which it is proper to have regard, what term is to be implied. One does not begin by assuming that the term as to payment is to be implied unless the employer displaces it." And at p 419C he said: "It may be at the end of the day, if there are no factors either way . . . that the correct inference is that if a man is employed for a period on a wage . . . the presumption will be that the wage is to be paid during the period of employment . . ." Slynn J's judgment was approved in the Court of Appeal [1982] ICR 696, 647, where Stevenson LJ said that the correct approach was to approach the facts and evidence "with an open mind unprejudiced by any preconception, presumption or assumption". The tribunal's task was to look at all the facts and draw an inference one way or the other. It might have drawn the inference that no sick pay was to be payable. It might have drawn the inference that sick pay was to be payable. It might, in modern conditions, have drawn an inference that sick pay was to be payable but with statutory sick pay taken into account in some way. But it was not appropriate for the tribunal to decide a case of the present kind simply by saying that it found insufficient evidence to satisfy it that it was a term of the contract of employment. It would be hard on a claimant to decide the case on the burden of proof when, contrary to law, the employer had not provided the claimant with any statutory statement of terms and conditions. The task of the tribunal was to make its mind up weighing the points one way or the other. The appeal tribunal was not in a position to say that there was only one answer to the question whether the employee should have been paid during her absence. There were factors both ways. The right course was to remit to the same tribunal to consider the issue of sick pay afresh and decide how its finding then fed in to the question of constructive dismissal.

Benjamin v Interlacing Ribbon Ltd; 1 November 2005; EAT/363 & 420/05
EAT: Judge Richardson, Mr D Chadwick and Mr D Evans

CONTRACT OF EMPLOYMENT

An employee, who had no written contract of employment, resigned after her employers refused to pay her at her full contractual rate during a period of sick leave. An employment tribunal, upholding her complaint of unfair dismissal, accepted her evidence that her understanding was that she would be paid for all periods of sick leave at her full contractual rate, as had been done in the past; and it held that the employers' failure to pay her full salary was a repudiatory breach of her contract of employment entitling her to resign.

LANGSTAFF J, dismissing an appeal by the employers, said that the appeal raised the question whether terms as to payment in a contract of employment might be implied by conduct. The law as to whether or not a term might be implied by previous conduct of the parties was best seen in the context set by the speech of Lord Hoffmann in *Carmichael v National Power plc* [1999] ICR 1226, 1233, where he dealt with a submission that an exchange of letters between power station guides and their employers constituted a contract which needed to be construed as though it were a legal document containing the complete contract. Lord Hoffmann thought that to do so would push the rule about construction of documents too far. He emphasised that the parties could, by their conduct, demonstrate what were the terms of the contract where the contract was otherwise silent. In the present case there was no written contract. Accordingly, the terms had entirely to be derived in the way set out by Lord Hoffmann in Carmichael. If there was evidence on which a tribunal might rely, it was entitled in a situation where there was no written contract to derive the terms of that contract; without deriving the terms of the contract from the surrounding circumstances as best it could, the tribunal would have no basis from which to start. The feature that would lead one to conclude that the practice of the parties demonstrated what the intention was, and that that was therefore the term that was binding on them for the future unless varied by consent, was a consistency sufficient to establish a pattern of treatment and no contrary evidence. If the tribunal was entitled to accept the claimant's evidence that during earlier periods of absence she had been paid at her full contractual rate, and if it was entitled to accept her understanding that she would be paid in that way for all periods of sickness, there was a term of the contract, derived from the way in which the parties had behaved towards one another in the past, that that was what would happen if she fell sick again. As it could not be said that the tribunal was not entitled to accept the claimant's evidence, the tribunal had been entitled to find that during periods of sickness the claimant was entitled to be paid at her full contractual rate. That left the question of whether the claimant was entitled to regard herself as constructively dismissed for that reason. In her resignation letter she complained twice about the employer's payment to her of statutory sick pay only; accordingly, the tribunal was entitled to be satisfied that her resignation was in response to the breach. As to whether or not the breach was sufficiently serious, the tribunal had right to conclude that a failure to withhold money due to an employee, and to maintain that that sum was not due, in breach of contract, was sufficiently serious to justify that employee in resigning.

Secession Ltd v Bellingham; 25 October 2005; EAT/69/05
EAT: Langstaff J, Ms K Bilgan and Mr D Wickens

GRIEVANCE PROCEDURE

After an employment tribunal had upheld a complaint of sex discrimination against her employer, which had involved bullying by a colleague, the claimant protested by solicitor's letter that the employer had made a public statement that it did not accept the tribunal's findings. The letter demanded a public statement by the employer accepting the tribunal's findings and indicating that disciplinary action would be taken against the colleague; it concluded by saying that unless those steps were taken the claimant would treat the employer as being in fundamental breach of contract forcing her to resign. No such undertaking was given by the employer despite further letters from the solicitor, and the claimant resigned. On her subsequent complaints of unfair dismissal and victimisation, the employment tribunal rejected the employer's submission that the claimant had failed both to comply with the statutory grievance procedure under the Employment Act 2002 and to provide in her claim form the information required by rule 1(4)(h) of the Employment Tribunals Rules of Procedure 2004.

JUDGE PETER CLARK, dismissing an appeal by the employer, said that in *Shergold v Fieldway Medical Centre* [2006] ICR 304 Burton J (President) had considered the approach to what constituted a grievance for the purposes of the statutory grievance procedure under section 32 of the 2002 Act. The employer argued that in that case, at para 33, the President did not have his attention drawn to regulation 2(2) of the Employment Act 2002 (Dispute Resolution) Regulations 2004. But that did not alter the President's statement of principle. The purpose of regulation 2(2) was to state that a written communication (for present purposes) might relate to matters other than a grievance. In those circumstances it mattered not whether the grievance was raised, for example, in a letter before action. The use of the word "intended" in the words in parentheses in regulation 2(2) did not record a requirement that in such communications there had to be an expressed intention to raise a grievance. The question was whether the definition of grievance in regulation 2(1) was met: was there a complaint in writing made by the employee about action which his employer had taken or was taking in relation to him? In the present case the correspondence relied on fulfilled those requirements. The action complained of was the employer's alleged breach of the implied term of mutual trust and confidence and victimisation arising out of the claimant's earlier protected act. The sequence of correspondence had to be read as a whole and it plainly raised a complaint in relation to both claims as required by section 32(2). It did not matter that the letters relied on were written by the claimant's solicitor. The employer referred to regulation 9 of the Dispute Resolution Regulations, which treated parties as having complied with the applicable statutory procedures if the written grievances were submitted by an "appropriate representative", defined as a trade union official or employee-elected representative. That provision was dealing with collective grievances; it did not exclude an individual employee's agent such as a solicitor from lodging a grievance on behalf of his client. While the absence of the words "without prejudice" on the claimant's solicitor's letter did not preclude them from being so characterised, it had to be clear from the surrounding circumstances that the parties were seeking to compromise the potential fresh claims: *Rush & Tomkins Ltd v Greater London Council* [1989] AC 1280. There was no indication that that was the aim. No element of compromise ever raised its head before proceedings were commenced. In the circumstances, the letters relied on met the statutory grievance procedure requirements of the legislation. Since 10 October 2005 all claims presented to employment tribunals had to be on the prescribed form. The claimant had initially used the old ET1 form, which was then permitted provided that it contained the information required by rule 1(4) of the 2004 Rules, in particular paragraph (h): "whether or not the claimant has raised the subject matter of the claim with the respondent in writing at least 28 days prior to presenting the claim to an employment tribunal office." Reference to two specific letters at paragraph 6 of the claimant's details of claim, viewed in the overall context of those details, satisfied the requirement of rule 1(4)(h).

Mark Warner Ltd v Aspland; 8 December 2005; EAT/531/05
EAT: Judge Peter Clark

HOLIDAY PAY

An employee, who was entitled under his contract of employment to 30 days' leave a year, which at the employer's discretion could be carried forward after termination of employment, had taken 16½ days leave in the current year, his statutory entitlement being 18 days, when he was dismissed. An employment tribunal dismissed his claim under the Working Time Regulations 1998 for payment for leave not taken based on his contractual entitlement on the ground that the employer had not exercised its discretion to carry forward the contractual entitlement and regulation 35 of the Regulations protected only the statutory entitlement.

SMITH J, dismissing an appeal by the employee, said that the tribunal had found that the employee was only entitled to 1½ days' pay in respect of leave not taken, but that he was not entitled to any order for payment as he had been overpaid by a sum in excess thereof. The essential issue between the parties before the tribunal was whether the Working Time Regulations 1998 had effect so as to entitle the employee to pay in respect of leave not taken according to a calculation based on annual leave entitlement of four weeks, or based on his contractual entitlement to leave. Where an employee left employment at a stage when he had not taken all the leave to which, in that leave year, he was entitled, the employer was required to pay compensation in accordance with regulation 14 of the 1998 Regulations, and the reason for his departure was irrelevant for that purpose. It was, however, quite clear that the protection of leave entitlement and the provisions for payment of compensation under the Regulations applied only to the period of four weeks' leave. There was nothing in the Regulations that rendered void a contractual provision that purported to limit or exclude any entitlement to leave or compensation in respect thereof in so far as that limitation or exclusion related to any period beyond the protected four-week period. Accordingly, a singe limitation or exclusion clause of that type would survive in so far as it related to any such period, although it would be of no effect in respect of the protected entitlement to compensation for leave to which an employee was statutorily entitled that had not been taken. The requirement to consider whether any clause in an employee's contract of employment was rendered void only arose if he had a contractual entitlement to pay in respect of leave not taken. In the present case, in the relevant year, the employee had a statutory entitlement to four weeks' paid leave, which, since he worked a five-day week, amounted to 20 days. The parties were agreed that his entitlement at the date of dismissal amounted to 18 days and that he had only taken 16½ days thereof. He had, accordingly, a statutory entitlement to pay in respect of the balance of 1½ days. The employee's contract gave him no right to be paid for leave not taken. It conferred a discretion on the employer to agree to do so, but that discretion was not exercised in his favour. In those circumstances, the employee had no contractual entitlement to pay for leave not taken at all.

Thomsom v Health and Safety Executive; 20 October 2005; EATS/35/05
EAT(Sc): Smith J, Miss S B Ayre and Miss A Martin

UNFAIR DISMISSAL

An employee who made a personal injury claim against her employers was dismissed for gross misconduct following a disciplinary hearing on the ground that the claim was fraudulent. On an internal appeal the employee relied on evidence not put before the disciplinary hearing. The employers disbelieved the evidence and confirmed her dismissal. An employment tribunal upheld a claim of unfair dismissal, concluding that though the employers had ostensibly dismissed her for fraud they had never in fact considered whether or not she had acted honestly and, therefore, had not satisfied themselves that the employee's conduct was dishonest. The tribunal further held that the internal appeal was not a rehearing and could not have cured any earlier defect.

ELIAS J, allowing an appeal by the employers, said that it was very well established that, in determining whether or not a dismissal was fair, an employment tribunal had, in an appropriate case, to have regard to material changes that emerged during the course of the internal appeal process: *West Midlands Co-operative Society Ltd v Tipton* [1985] ICR 444. Accordingly, in so far as the employers relied on additional material to reach their conclusion on the appeal that there had been fraud, they had been fully entitled to do so. The employment tribunal was in error in suggesting that additional material which emerged during the course of an appeal hearing could only be taken into account where there was a complete rehearing. There was no doubt that if a significant procedural defect occurred at an initial disciplinary hearing that could only be put right if there was a rehearing on appeal and not simply a review: *Whitbread & Co plc v Mills* [1988] ICR 776. The reason for that was that, if there was an unfairness in the way in which the initial hearing was conducted, there was no safeguard for the employee if the further appeal simply reviewed the original decision but did not provide the procedural safeguards that were lacking on the earlier occasion. It did not follow, however, that where the initial hearing was procedurally fair additional material could only be taken into account where there was a full rehearing. The question ultimately was whether in all the circumstances the procedures were fair. In the present case there was no complaint about the way in which the employers carried out the disciplinary hearing or the appeal hearing. Accordingly, the tribunal ought to have considered the material before the appeal hearing and assessed whether the employers had acted reasonably in the circumstances in taking the view that the employee had committed misconduct. The tribunal also concluded that there was no evidence that anyone had addressed the question whether the employee had been dishonest. But on the appeal the employers clearly considered that the employee had been fraudulent. If an employer dismissed someone for fraud then unless it was shown that the employer had misunderstood that term, as it appeared the person conducting the disciplinary hearing did, the only reasonable inference was that the employer was alleging dishonesty. The possibility of a genuine but mistaken belief did not arise. Therefore the tribunal also erred in indicating that the employers had never addressed the question of whether the employee had been dishonest. The case would be remitted to a fresh tribunal.

Arriva North West & Wales v Colebourn; 18 October 2005; EAT/439/05
EAT: Elias J and Mrs R Chapman

COSTS

An unsuccessful claimant before the employment tribunal was ordered to pay costs of £10,000 to the respondent on the ground that her claim was misconceived and, in some areas, conducted unreasonably within the meaning of rule 40 of the Employment Tribunals Rules of Procedure 2004.

JUDGE ALTMAN, allowing an appeal by the claimant, said that rule 40(2) involved a two-stage process. The first stage was the formation of an opinion as to whether the circumstances in rule 40(3) applied. Those circumstances were where a party had in bringing the proceedings, or he or his representative had in conducting the proceedings, acted vexatiously, abusively, disruptively or otherwise unreasonably, or where the bringing or conducting of the proceedings had been misconceived. The second stage, where those circumstances did apply, was to consider whether it was appropriate to make a costs order. The tribunal, in its judgment, concluded that the proceedings had been unreasonably conducted in relation to disclosure and pre-hearing correspondence and that very substantial parts of the claim were misconceived and wholly unrealistic. The tribunal then went straight on to say: "The tribunal therefore makes an order for costs in the full sum of £10,000 sought by the respondent." The cost of defending the claim before the employment tribunal was calculated by the respondent to be in the order of £23,000. In order to avoid the need for further assessment, and no doubt being realistic about the means of the claimant, the respondent limited its application for costs to £10,000, the maximum for a summary order. The claimant argued that the tribunal had taken a global non-compensatory approach to the calculation of costs. It was said that the award of the maximum available to the tribunal without going for a detailed assessment was so extraordinary as to indicate it was made on a punitive and deterrent basis and that there was no reference to the exercise of discretion or to the reasons for the award. The tribunal had, however, accepted the assertion of the respondent as to the true costs, and, no doubt with the chairman's experience of claims, came to a judgment about it. But, it was certainly the experience of the appeal tribunal that £10,000 as an award against a former employee was exceptional and much higher than the general band of awards in cases where comparable findings of misconception and unreasonableness had been made; and awards were normally associated with the means of the former employee. There was an inference to be drawn from the adoption by the tribunal of the figure of £10,000 without further investigation. Having found the areas of unreasonableness and misconception, a tribunal was bound to pause, stand back and look at all the factors to be taken into account when assessing the appropriate level of compensation. That involved balancing the amount of the costs incurred by the unreasonableness, or the misconceived part of the claim, against other parts of the claim and taking account of the need, if the tribunal considered there was a need, for some compensation and costs. The tribunal, however, did not go through that process. It did not exercise a discretion in assessing the compensation that was appropriate. It stopped effectively at the end of the first stage. The appeal tribunal had sufficient information to review the approach to costs and substitute an appropriate figure, and, bearing everything in mind, it was appropriate to reduce the award of costs to £5,000.

Beat v Devon County Council; 6 December 2005; EAT/534/05
EAT: Judge Altman, Dr B V Fitzgerald and Mr D J Jenkins

DEFAULT JUDGMENT

A tribunal chairman refused an application by respondent employers, under rule 33 of the Employment Tribunals Rules of Procedure 2004, for a review of a default judgment issued following their late response, which was two days out of time, to the claimant's claims of unfair dismissal and sex discrimination, on the ground that, although on the face of it the employers had a reasonable prospect of successfully responding to the claim, there was no good reason for the delay.

JUDGE PETER CLARK, allowing an appeal by the employers, said that in *Pendragon plc v Copus* [2005] ICR 1671 Burton J (President) indicated that, in exercising the discretion to review a default judgment, a chairman should take account of all relevant factors including the explanation or lack of explanation for the delay and the merits of the defence, weighing and balancing them, and to reach a conclusion which was objectively justified on the grounds of reason and justice, and in so doing to balance the possible prejudice to each party. The chairman had been entitled to find that no good reason had been put forward for the delay for the purposes of rule 33(6). The employers submitted that, in contrasting the words "may" and "must" in rule 33(5) and (6) respectively, the chairman misconstrued the intention behind rule 33 to the extent that he unduly elevated the factor of lack of good reason for the delay above what was intended. Rule 33(5) used the word "may" to give a discretion to the chairman to consider revoking or varying a default judgment only if the respondent had a reasonable prospect of successfully defending. That was the gateway to the discretion, and why the word "may" was used. However, the use of the word "must" in rule 33(6) merely imported that, in exercising that discretion, a chairman had to take into account whether or not there was a good reason for the delay. It identified a mandatory factor but it did not, contrary to the approach of the chairman, elevate it into a significant factor, i e a factor which necessarily weighed more heavily in the balance than the other factors. The chairman took into account the effect any delay would have on the claimant, but did not put into the balance the draconian effect on the employers of refusing the review application. It was apparent from rule 9 that the effect of the default judgment was to preclude the employers not only from defending as to liability but also as to remedy in a claim for unlimited damages. Accordingly, the chairman had erred in misconstruing rule 33(5) and (6) and in considering the balance of prejudice, and the default judgment could not stand. Exercising the discretion vested in the chairman, the review application succeeded and the judgment would be set aside.

The Pestle & Mortar v Turner; 9 December 2005; EAT/652/05
EAT: Judge Peter Clark

DISABILITY DISCRIMINATION

After a lecturer experienced problems with his voice and was diagnosed as suffering from functional dysphonia, an occupational health report recommended adjustments to be made and that a review should take place in September 2002. No review took place and no allowance was made for his condition in drawing up the timetable. In October 2002 his voice broke down and he went on sick leave. In December the employer notified him that it was to undertake a restructuring process. He unsuccessfully applied for the post of co-ordinating lecturer in manufacturing. No account was taken by those grading him of his successful teaching record or performance over 26 years or his range of experience. Upholding his complaint of, inter alia, discrimination contrary to section 5(2) of the Disability Discrimination Act 1995, the employment tribunal found that the process to which the claimant was subjected was grotesquely unfair and that the method and procedure were intended to be disadvantageous to the claimant because of a predetermined conclusion that he should not be retained as a lecturer because of his medical condition.

JUDGE BIRTLES, dismissing an appeal by the employer, said that the first ground of appeal was that the tribunal had misapplied the law in respect of reasonable adjustments, in that it had incorrectly stated that the employer had a duty to create a new job for the claimant and had failed to take into account clear evidence as to the claimant's inability to continue teaching on a full or part time basis; and that, furthermore, the tribunal had failed properly to apply the justification defence. The appeal tribunal were mindful that each case was fact specific. In the present case the employer did nothing and did not consider reasonable adjustments at all. Further, section 6(3) of the 1995 Act did not, *as a matter of law*, preclude the creation of a new post in substitution for an existing post from being a reasonable adjustment. It depended on the facts. The present case concerned a substantial reorganisation, and, as the tribunal found, the employer had "a blank sheet" so far as the job specification was concerned. It followed that it was possible to devise a job that would take account of the effects of the claimant's disability. But the employer did not do so, nor did it make any attempt to apply to the claimant the pledge in its restructuring plans to consider redeployment and retraining. On the facts, that was a conclusion to which the tribunal could come. The employer challenged the tribunal's finding that it should have considered redeploying/retraining the claimant, while accepting that redeployment/retraining could amount to a reasonable adjustment under section 6(3)(c)(g). But it was quite clear that the tribunal carefully considered all the medical evidence, which was substantial, and that that, and other factual evidence, supported the contention that the claimant could have remained employed by the employer. The fact of the matter was that the employer did not consider the question of reasonable adjustments at all. There must be many cases in which a disabled person was placed at a substantial disadvantage in the workplace, but in which the employer did not know what it ought to do to ameliorate that disadvantage without making inquiries. To say that a failure to make those inquiries would not amount to a breach of the duty imposed on employers by section 6(1) would render that subsection practically unworkable in many cases. A proper assessment of what was required to eliminate the disabled person's disadvantage was therefore a necessary part of the duty imposed by section 6(1). The employer then submitted that the tribunal did not go on to consider whether the employer was justified in failing to make reasonable adjustments. The scope of the justification defence under section 5(4) was narrowed in *Collins v Royal National Theatre Board Ltd* [2004] IRLR 395, where the Court of Appeal held that the only workable construction of section 5(4) was that it did not permit justification of a breach of section 6 to be established by reference to factors properly relevant to the establishment of a duty under section 6.

Southampton City College v Randall; 7 November 2005; EAT/372/05
EAT: Judge Birtles, Mr P Gammon and Mr D J Jenkins

RESPONSE

A respondent employer was granted a one-month extension of time to enter a response to claims of unfair dismissal and for unpaid wages. Three days after that time expired the employer applied for a further extension, which was refused as being itself out of time and as lacking merit. An application by the employer for a review of that decision, accompanied by the proposed response, made nine days after the expiry of the time limit, was refused by a chairman.

JUDGE RICHARDSON, allowing an appeal by the employer, said that the employer's defence was that the employee procured his work permit and employment by false and misleading documents and was thereby disentitled to bring any claim arising out of his employment by reason of illegality. An interlocutory decision of the kind under appeal would only be challengeable where the tribunal had exercised its discretion under a mistake of law or in disregard of principle or under a misapprehension as to the facts. The chairman had been correct to direct himself to *Moroak v Cromie* [2005] ICR 1226 and without doubt had in mind the correct principles. Also, he was entitled to reach the conclusions he did as to the employer's explanations for the delay. However, when the chairman came to consider the merits of the response, he left out of account matters which it was essential for him to consider. The first was the claim for earnings of £23,324. He did not take it into account at all in his evaluation of the merits; but it was an important claim to consider. The defence related to more than £15,000 and was based on the hours given by the employee himself. The second matter was the alternative response to the unfair dismissal claim, which, again, could only be resolved fairly by hearing evidence on both sides. Dealing with the illegality point, the chairman said that it had no reasonable prospect of success "because it alleges deception in the way the employee obtained employment. Such circumstances, if true, do not oust the jurisdiction of the tribunal". The mere fact that an allegation of illegality related to a deception in the way an employee obtained employment did not, in and of itself, bar such a claim. Moreover, such a matter could be characterised not only as a matter of jurisdiction but also as a matter of defence, a defence commonly dealt with if necessary at a preliminary hearing. The chairman's balancing exercise was vitiated by the failure to consider other aspects in which the response had potentially more merit than he believed the illegality claim to have. If a defence did have reasonable prospect of success and was important, it would not generally be a sufficient reason for barring it merely that one important element of the proposed grounds of resistance had no reasonable prospect of success. Also, it would always be important for a chairman carrying out the balancing exercise to have regard to the length of the period of delay. In the present case there was no express reference to the length of the delay and, bearing in mind that it was relatively short, it would be an important matter to consider. When one took into account all the potential lines of defence adumbrated and the length of the delay in putting in a response, unsatisfactory though the explanation for that delay might have been, the case was sufficiently plain for the appeal tribunal to find that the response ought to have been accepted. Accordingly, a decision to accept the response would be substituted.

Kredenza Ltd v Jovicevic; 10 November 2005; EAT/605/05
EAT: Judge Richardson

UNFAIR DISMISSAL

An employment tribunal found that an employee earning £100,000 a year had not been generating sufficient revenue to justify his salary but had been unfairly dismissed due to a lack of consultation. It made no reduction in the compensatory award to reflect the lack of the chance of the employee remaining in his job if a fair consultation had been followed.

JUDGE PUGSLEY, allowing (by a majority) an appeal by the employer, said that the employer pointed out that it never formed part of the employee's case that he would have remained in the £100,000 a year job, but that consultation might have opened up alternatives such as an agreed reduction in pay or a sabbatical. There was an inevitable area of speculation and artificiality about assessing what would have happened if an employee had been consulted in a redundancy case. In *Lionel Leventhal Ltd v North* (unreported) 27 October 2004 the employment tribunal had said that it could not speculate as to what might have happened had the employer consulted properly and consequently did not reduce the compensatory award to take account of the possibility of a fair dismissal for redundancy after adequate consultation. Bean J made it clear that that was not a matter of speculation; that it was a matter of assessment of the possibility that a scrupulously fair procedure would have made no difference. The majority view of the appeal tribunal was that the issue of whether or not the employee would have accepted alternative employment or a lesser salary was raised before the employment tribunal and there was consideration of the relative salaries of alternative employment. The consequence of the tribunal's failure to make any reduction against the possibility that the employee might have taken a lower paid job was a finding by default that, had there been consultation, he would have remained in his job at £100,000 a year. In view of the findings of fact that the tribunal made as to the employer's need to cut the payroll bill and the employee not justifying his salary, the tribunal reached the somewhat inconsistent decision that it was necessarily acceptable for the employer to take the course it did and make the employee redundant but that if there had been consultation he would nevertheless have retained his employment at the same salary. The employment tribunal had the obligation, difficult though it was, to consider, on the evidence before it of alternative employment, what percentage chance there was that if there had been consultation the employee would have accepted employment at a lower level. The tribunal decision was not so flawed that the matter could not be returned to the same tribunal to reconsider and reach a view as to what discount, if any, it should make against the possibility that the employee might have retained his job but with a loss of income.

Secor Consulting Ltd v Meffen; 2 December 2005; EAT/180/05
EAT: Judge Pugsley, Mr D G Smith and Mr P Smith

AMENDMENT

An employee completed an ET1 claim form, alleging discrimination and ticking all the boxes in section 6 of the form except "sexual orientation". Under section 6(2) she claimed that after returning to work in 2000 following a career break she was racially discriminated against and when she tried to resolve her grievance internally that had made things worse and that in 2004, after three years' sick leave, the discrimination had continued. A tribunal chairman refused the employee permission to amend her claim to add complaints, arising from the same facts, that she had been subjected to a detriment because she had made protected disclosures, namely grievances, in 2001 and 2005, and had been victimised for having presented the grievance in 2001.

KEITH J, allowing an appeal by the employee, said that in order to decide whether the claim of victimisation as a result of the presentation of the grievance in 2001 was a new claim, it was necessary to look at the ET1. The employee argued that if a claimant ticked any of the boxes in section 6(1) the claimant was alleging discrimination in whatever form discrimination could take. Such a claimant had, therefore, to be treated as having included in the claim for discrimination a claim for victimisation whether or not the claimant gave details of the claim in section 6(2) and whatever those details might be. The answer to that argument was provided by *Ali v Office of National Statistics* [2005] IRLR 201, 207. If a claimant ticked any of the boxes in section 6(1) but gave no details of the claim in section 6(2), the claimant had to be treated as alleging discrimination in whatever form discrimination could take, though the claimant could be required to give particulars of the claim. If, on the other hand, details of the claim were given in section 6(2), those details would identify the particular form of discrimination being alleged. So, if the details of the claim given in section 6(2) showed that the claim did not include an allegation of victimisation, any subsequent attempt to allege victimisation would amount to a new claim for which leave to amend was required. In deciding whether the employee's ET1 included an allegation of victimisation, it was necessary to look at the language she used in the context that she was a not a lawyer and wrote the content of section 6(2) herself. The crucial words were: "I have tried to resolve my grievance informally but this has made [the] situation worse." She had already said that she was being discriminated against before she presented her grievance in 2001; if the presentation of the grievance made things worse, she could only have been saying that the discriminatory treated got worse as a result of the grievance. That was an allegation of victimisation. She did not limit the period during which things got worse, and in further particulars she stated that she believed all her colleagues knew of her previous grievance and she was thus discriminated against by way of victimisation. It followed that the allegation of victimisation was not a new claim and the employee did not need leave to amend to pursue it. The acts complained of in the protected disclosure claim were the acts of discrimination to which the employee was subjected as a result of the presentation of her grievances in 2001 and 2005, and it was a new claim only in the sense that a new label was being applied to the claim of victimisation already made. Following *Skelkent Bus Co Ltd v Moore* [1996] ICR 836, 843–844, where a new claim arose out of facts which had already been alleged in the originating application, or claim form, the proposed amendment was considered under the general principles applicable to amendments. Only new claims which arose out of new facts would be subject to scrutiny in respect of time limits. In the present case the chairman had refused to permit the claim form to be amended to enable the protected disclosure claim to proceed, on the basis that the time limit imposed by section 48(3) of the Employment Rights Act 1996 had expired. That was the wrong approach. Since the protected disclosure claim simply applied a new label to the facts which had already been set out in section 6(2) of the ET1, the application for leave to amend should have been dealt with in accordance with general principles. It might be that the claim added little to the victimisation claim, but, since it would not involve proof of facts over and above those needed to be proved for that claim, no additional evidence would be needed. The employers would suffer no relevant prejudice if the claim was allowed to proceed, and the employee would be granted leave to amend to include her protected disclosure claim.

Ennever v Metropolitan Police; 7 March 2006; EAT/51/06
EAT: Keith J

CONSULTATION

In January 2003 an employer gave notice to the Department of Trade and Industry ("DTI"), pursuant to section 193 of the Trade Union and Labour Relations (Consolidation) Act 1992, of the proposed redundancies of over 400 production operators and maintenance operators then engaged on 12-month fixed term contracts and, as required by section 193(6), sent a copy of the notification to the relevant union. From February a series of consultation discussions took place with the result that the contracts of the temporary workers were extended and no relevant redundancies were declared during 2003. In March 2004 the employer, without informing the union, obtained an extension of the notification from the DTI, and in September notified the DTI of some 345 potential redundancies, but the union were not copied. In

November 2004 46 temporary employees were dismissed. The employment tribunal upheld a complaint by the union, under section 189, and made a protective award.

JUDGE PETER CLARK, allowing an appeal by the employer, said that the central issue was whether the employer had been entitled to rely on the statutory information provided to the union in January 2003, which complied with the requirements of section 188(4) of the 1992 Act, in relation to the dismissal of the 46 temporary employees in November 2004. The first point to be made was that a clear distinction had to be drawn between the requirements of section 188 vis-à-vis employer/union and the requirements of the employer vis-à-vis the DTI under section 193, which the tribunal did not appear to have had in mind. Curiously, though section 193(6) required the employer to provide a copy of the notification to the DTI to the union, section 188 did not include the same requirement, and the focus of the tribunal on a section 189 complaint had to be on the section 188 requirements. Given that it was common ground that the statutory information required by section 188(4) had been properly given to the union in January 2003, did there come a point on the particular facts when section 188 compliance was spent? Section 188 did not provide an unlimited shelf-life, but, in the present case, the tribunal had found that an on-going dialogue about the status, extension and transfer of the temporary employees had taken place from February 2003 up to the eventual relevant dismissals in November 2004. It had had precisely the effect envisaged by section 188(2). First there were extensions of the temporary employees' fixed-term contracts; and in September 2004 twelve out of the then 58 remaining temporary employees were moved to permanent positions. The crunch then came in relation to the remaining 46. The employer would not accede to the union's request that they be joined with the 341 permanent employees in a forthcoming restructuring exercise. The union submitted that the employer's position as to those remaining 46 amounted to a substantial change entitling the tribunal to conclude that a fresh section 188 process was thereby triggered. The appeal tribunal did not agree: the entire consultation process from January 2003 until November 2004 had continued seamlessly. The reference to 90 days in section 188 did not mean that, if the process of consultation extended beyond that period, it had to re-start statutorily. The 90-day period fixed the start of the consultation; it did not determine when it finished—provided that consultation dealt with the same employees and the same prospective redundancies, there were no grounds for declaring the employer to be in breach of section 188. The employer having complied with its section 188 duty in January 2003, on the facts, what followed right up to the dismissals in November 2004 was precisely the sort of meaningful and effective consultation envisaged by the legislation.

Vauxhall Motors Ltd v Transport and General Workers Union; 22 February 2006; EAT/657/05
EAT: Judge Peter Clark, Mrs R Chapman and Mr D Norman

GRIEVANCE PROCEDURE

An employee's solicitor wrote to the employee's employers, in a letter expressed to be "without prejudice", stating his client's intention to take tribunal proceedings within 14 days if settlement was not reached in relation to his claims of unfair (constructive) dismissal, breach of contract and failure to inform and consult contrary to the Transfer of Undertakings (Protection of Employment) Regulations 1981, and detailing the claims and quantifying the employee's loss. An employment tribunal chairman ruled that the letter, while not expressly stated to be a "grievance", amounted to compliance with section 32 of the Employment Act 2002.

LADY SMITH, dismissing the employers' appeal, said that the employers submitted that the tribunal had misdirected itself in finding that the employee's solicitors' letter was an intimation of grievance, and that it was a letter of claim and not a letter which evinced any intention of invoking the employers' grievance procedure. It was said that the word "grievance" was not used; that nothing was said either expressly or impliedly to invoke the statutory or other grievance procedure; that the letter concluded with the words "without prejudice"; and that the intention behind the letter was to claim financial compensation, not to invoke a grievance procedure. It was further submitted that the definition of "grievance" in regulation 2 of the Employment Act 2002 (Dispute Resolution) Regulations 2004 ought to be ignored; that the relevant provision was regulation 6(1) and, if the regulation 2 definition of grievance was inserted where the word "grievance" appeared in that paragraph, the result was incomprehensible; but that if the literal meaning of "grievance" was used, its application favoured the employers' case that the letter was not a clear invocation of a grievance procedure. That argument could not be upheld. While the drafting of regulation 6(1) was poor, the correct analysis was that tautology had been achieved and the words "about action by the employer" appeared to be quite unnecessary, but the meaning was obvious, namely that the first condition for the applicability of the grievance procedures set out thereafter was that the employee had a complaint about action taken by or contemplated by his employer in relation to him. Otherwise, the legal principles to be applied appeared to be simple. According to the statute, if a claimant who wished to bring certain claims before the employment tribunal had failed, prior to trying to do so, to set out his grievance in writing to his employer, the tribunal could not entertain his claim. However, that gave rise, in the present case, to two questions. If the claimant's solicitor intimated a grievance, was that sufficient for compliance, or was the claimant required to effect the written intimation himself? If the written intimation was a letter of claim that included an ultimatum threatening the institution of proceedings within 14 days if settlement on the terms proposed was not reached, finishing with the words "without prejudice", could it properly be regarded as the intimation of a grievance? There was no good reason why the normal rules of agency should not apply, which meant that a grievance could be set out and sent to an employer by a solicitor instructed to do so by the claimant. In regard to the second question, in *Shergold v Fieldway Medical Centre* [2006] ICR 304, para 26, Burton J (President) stated: "It is quite plain that the purpose of this legislation was to encourage conciliation, agreement, compromise and settlement rather than the precipitate issue of proceedings." However, neither the 2002 Act, nor the 2004 Regulations, required that to start the new grievance procedure rolling the employee needed do anything more than write down his complaint and send it to his employer. There was no requirement to use any particular form or style, nor any requirement that the grievance was to be the only thing in whatever document was sent. It did not even need to be signed or contain a request for discussion or a meeting. All that was required was that the employer was put on notice that the employee was complaining about his actual or apprehended conduct in relation to that employee. There was nothing to prevent it being aggressive or contained in a letter which threatened tribunal proceedings if the employee's demands were not met. Accordingly, the statutory provisions did not prevent the solicitors' letter being regarded as an effective intimation of grievance. It also followed that it was not fatal that the letter failed to use the word "grievance". Nor did the use of the "without prejudice" formula prevent the letter being viewed as a statement of grievance for the purposes of section 32 of the 2002 Act.

Arnold Clark Automobiles Ltd v Stewart; 20 December 2005; EATS/52/05
EAT(Sc): Lady Smith, Mr P Pagliari and Mr P M Hunter

PROCEDURE

An employment tribunal heard an employee's unfair dismissal claim on the basis, agreed by the parties, that the only issue was whether dismissal was within the range of reasonable sanctions. The tribunal gave brief oral reasons, upholding the claim on the grounds that no reasonable employer would have regarded the employee's conduct as gross misconduct and that dismissal was not an appropriate sanction. When written reasons were requested, the tribunal suggested a further hearing, at which the parties were assured that the earlier oral judgment was not final and made submissions, based on the evidence given at the first hearing, on the issue of whether the employers' belief that the employee's conduct amounted to gross misconduct was reasonable. The tribunal upheld the claim, concluding that the employers could not reasonably have believed in the misconduct and that dismissal was not an appropriate sanction.

JUDGE BURKE QC, dismissing an appeal by the employers, said that it was clear to all at the second hearing that the tribunal were seeking further submissions on a point which it now considered to be relevant to its decision but which had not been considered relevant at the original hearing and it was, therefore, giving the parties an opportunity to address the tribunal on the new point. The employers contended that the procedure adopted by the tribunal constituted a breach of natural justice, because the tribunal reached its conclusion on a different basis from that which had been the subject of an argument at the first hearing without the parties having the opportunity to present evidence and address arguments on the test in *British Home Stores Ltd v Burchell (Note)* [1980] ICR 303, and that that breach of natural justice had not been cured by the further hearing. The employers relied on *Hanks v Ace High Productions Ltd* [1978] ICR 1155, arguing that the tribunal had already reached a clear decision, and the proper course would have been for the tribunal to proceed by way of a review. There was, however, no indication that the tribunal had made up its mind on the issue of reasonable belief in misconduct before inviting the parties to address the tribunal on it at a reconvened hearing. While it was unfortunate that the tribunal only realised after it had given oral reasons for its decision in favour of the employee that there was another relevant issue, it did have jurisdiction to act as it did, and it acted properly and fairly in taking that course. It was not a case in which a clear decision had already been reached on that issue. Though the power to take such a course should be used carefully and sparingly, there was no error of law, want of natural justice or unfairness in the present case; and the suggestion that a review might have been a better way to proceed did not offer any real benefit compared with the course the tribunal took. As for the substantive decision, the tribunal made no error of law in reaching the conclusion that no reasonable employer could have regarded the employee's conduct as gross misconduct; and, on the issue of sanction, the tribunal applied the right test and came to a conclusion that it was open to it to reach.

West Yorkshire Magistrates' Courts Service v Smith; 19 December 2005; EAT/436/05
EAT: Judge Burke QC, Mr D Welch and Mr P Wickens

TIME LIMIT

An employment tribunal chairman dismissed an employee's claim of unfair dismissal, presented more than three, but less than six, months after his dismissal, as being out of time on the ground that the three-month extension to the primary time limit provided by regulation 15 of the Employment Act 2002 (Dispute Resolution) Regulations 2004 did not apply, since the employers had first contemplated dismissing the employee before the commencement of the Regulations.

JUDGE PETER CLARK, dismissing an appeal by the employee, said that regulation 18(a) of the 2004 Regulations provided that the Regulations applied where the employer first contemplated dismissing the employee after the Regulations came into force on 1 October 2004. Accordingly, the critical issue for the tribunal chairman was whether the employers had contemplated dismissing the employee before that date. The chairman found that the employers' head of human resources had first discussed the employee's case with a senior manager on a date before an investigatory meeting which took place on 26 August 2004, but that the employee had not known that his conduct, as opposed to his capability, was under review or that the outcome might be dismissal, rather than monitoring or training, until 25 October 2004. She rejected an argument that the test of when the employer first "contemplates" dismissing the employee was not a subjective issue wholly for the employer but also included communication of that fact to the employee. It was argued on appeal that the test under regulation 18(a) as to when dismissal was first contemplated by the employer had to be an objective one. That argument could not be accepted. What was contemplated by the employer was what was in his mind, just as the reason for dismissal for the purposes of section 98 of the Employment Rights Act 1996 was the set of facts in an employer's mind that led him to dismiss. An element of communication to the employee, whether actual or constructive, was not to be imported into the plain wording of regulation 18(a) as to when the employer first contemplated dismissal. Accordingly, the submission that the relevant date was the date of the employee's actual knowledge or the date when a reasonable employee would have concluded that the employer first contemplated dismissal would be rejected. As to who the employer was for present purposes, it would include the senior manager, who carried out the investigation and determined that a disciplinary hearing would take place, at which she would be pressing for a decision to dismiss by the ultimate decision-maker. The fact that it was the head of human resources who wrote the letter which represented step 1 of the statutory grievance procedure did not prevent the senior manager from being treated as the employer.

Madhewoo v NHS Direct; 1 March 2006; EAT/30/06
EAT: Judge Peter Clark

BURDEN OF PROOF

An employee, who was in a senior position handling the provision of management consultancy services to various organisations, was selected for redundancy in August 2001, on the basis of her monthly billings following her gender reassignment in April 2000. On her complaint, inter alia, that on the ground of her gender reassignment her employer discriminated against her in the allocation of work, contrary to section 2A of the Sex Discrimination Act 1975, the tribunal refused to order disclosure of documents relating to projects and proposals worked on by the group of which the claimant was a member, "noting that the burden was on the employer to prove or support any contention it made in that regard". The employment tribunal found that there were primary facts from which it could infer discrimination and that the burden of proof passed to the employer in accordance with section 63A of the 1975 Act. While commenting that it would have liked to have had a list produced by the employer of all the projects staffed in the relevant period and that it was dissatisfied with the state of the evidence, the tribunal concluded that it had to make a decision on the evidence before it and found that the claimant had not been unlawfully discriminated against in the allocation of work. Accordingly, it rejected her sex discrimination complaint. The Employment Appeal Tribunal dismissed an appeal by the claimant.

HOOPER LJ, allowing an appeal by the claimant, said that the claimant submitted that the employment tribunal's reasoning showed that it did not in fact place the burden of proof on the employer. She also complained that the employer did not produce the necessary material to discharge the burden of proof, leaving it to her to try and prove discrimination. The manner in which a tribunal should approach section 63A was determined in *Igen Ltd v Wong* [2005] ICR 931. The tribunal had made no finding as to how many projects were handled by the claimant's group during the material period, but, on a rough best from a spreadsheet covering 1998 to 2001, there appeared to be over 200 projects of which the claimant worked on only three and that was in 2000. That was what the employer should have had to justify, in comparison to the immediately preceding period. That did not happen and it appeared that the tribunal did not have the necessary material available to it, the employer's approach being to require the claimant to identify which projects she should have been staffed on. There were a number of passages in the decision where the employment tribunal was overlooking the fact that the burden of proof was on the employer. The employer had adopted a fundamentally wrong approach to the litigation and in so doing had deprived the claimant of a fair trial. Although the tribunal had commented on the absence of documents or schedules from the employer, it failed to appreciate the consequences of that absence. Once the burden of proof had shifted, those consequences could only be adverse to the employer. The failure was not that of the claimant: it deprived the employer of the opportunity to rebut the case made against it. The employer argued that it would have been disproportionate to have listed all the projects setting out why the claimant had been allocated no more than three in the period May 2000 to August 2001. That was difficult to accept. The employer also submitted that if it was not asked about a project it was not required to prove it. That demonstrated the employer's approach to the litigation and rendered section 63A all but meaningless. If an employer took the stance adopted by the respondent, claimants—and particularly those with limited means—who challenged large corporations would be at a great disadvantage and the reverse burden of proof provision might be rendered of little or no use to them. It was not a suitable stance in a difficult discrimination case. It was important for tribunals to bear in mind the objectives of section 63A at the pre-hearing and hearing stages. Employers should not be permitted to escape the provisions of section 63A by leaving it to the employee to prove her case. On the facts of the present case only a detailed analysis could discharge the burden. Without such analysis it was very difficult to see how the employer could justify the fact that the claimant was only allocated some three projects over such a long period. The findings of the employment tribunal could not stand. The case had called out for a pre-hearing case management conference during which the consequences of the burden of proof moving to the employer (if it later did move) were worked out. The proper course was to remit the discrimination complaint to a new tribunal for a fresh hearing.

WARD and MOSES LJJ agreed.

EB v BA; 22 February 2006; [2006] EWCA Civ 132
CA: Ward, Hooper and Moses LJJ

EMPLOYMENT PARTICULARS

An employee who had been dismissed in October 2003 made a number of claims relating to her dismissal including a claim that the employers had failed to provide her with a written statement of terms and conditions of employment. The employment tribunal upheld that claim and, at a subsequent remedies hearing, made an award thereon only of compensation in respect of an unnotified deduction of pay arising out of the failure to provide the written statement. The claimant appealed on the ground that under section 38 of the Employment Act 2002 the tribunal was obliged to make an award of two weeks' pay and could, if it considered it just and equitable, award four weeks' pay.

JUDGE REID QC, allowing the appeal, said that the employers contended that the dismissal took place, in October 2003, before section 38 of the Employment Act 2002 came into force on 1 October 2004; that before that date the only remedy open to the employment tribunal was to make a declaration, and it had no jurisdiction to award compensation; and that the section could not have been intended to have retrospective effect. There was, however, nothing in the commencement order which disapplied the section in the case of dismissals occurring or applications commenced before 1 October 2004. On their face the words of the section seemed to require a tribunal making a decision after the commencement date of the section to make a financial award under subsection (2) or (3), as the case might be, in the absence of circumstances bringing subsection (5) into play. If Parliament had intended that the section should not have effect in relation to proceedings commenced or dismissals occurring before the section was brought into effect, it could have said so. Similarly, the Secretary of State had had the opportunity to exclude such cases when he made the commencement order. It did not seem that there was any injustice in not doing so. The section created a new remedy for failure to comply with a pre-existing obligation. It did not create a new obligation. The section had been in existence for some two years before it was brought into effect. If an employer chose to ignore that possible liability, he had only himself to blame. The employment tribunal had erred in not addressing the claimant's prima facie right to an award under section 38 and either making an award or giving reasons as to why under subsection (5) no award was being made.

Lewald-Jezierska v Solicitors in Law Ltd; 16 June 2006; EAT/165/06
EAT: Judge Reid QC, Mr J Mallender and Dr K Mohanty

PROCEDURE

At the close of evidence in a race discrimination claim, the employment tribunal made an order for written closing submissions and submissions in response to be sent in by a stated date, in default of which they would not be considered. The parties sent in their submissions and replies but due to an administrative error the claimant's submissions were not placed before the tribunal at the chambers discussion. The claim was dismissed on the ground that it was out of time and it would not be just and equitable to extend time, only the respondent's reply being considered. When the error came to light a review took place at which the tribunal reconsidered their initial reasoning in the light of the claimant's submissions and decided that no new argument was raised that made any difference to their original decision. They directed themselves to consider whether a fair minded and informed observer would conclude that there was a real possibility that they were so influenced by their original judgment that they would be unable to conduct a fair review, and affirmed their decision.

JUDGE BIRTLES, dismissing an appeal by the claimant, said that the claimant's ground of appeal was that it was not possible for the tribunal to consider the matter by way of review unencumbered by their prior knowledge and consideration of the respondent's submissions and any view they might have formed about the claimant as a result of the absence of his submissions. The employment tribunal had, however, applied the correct test when they asked: "whether it is possible that the submissions we had not seen when we reached our judgment could in any way have affected the reason we used in reaching our decision. If the claimant's submissions contain a new argument or relevant legal authority which could potentially have impacted on our thought process, then it would be right to revoke our original decision . . . However, it would not be fair to the respondent or in the interests of justice to revoke our judgment . . . if in fact no new issue or new light on an existing issue is shown in the submissions." In *Stanley Cole (Wainfleet) Ltd v Sheridan* [2003] ICR 1449, 1461, Ward LJ remarked: "The hearing will not have been unfair if it has caused no substantial prejudice to the party claiming to be aggrieved. It must, therefore, also be shown . . . that a material injustice has resulted." The same principles applied to the present case. There was no dispute that the failure to supply the members of the employment tribunal with the claimant's written reply was an administrative failure by the tribunal staff, but for the claimant to succeed he needed to show that he had suffered something which was "seriously irregular and unfair" or "substantial unfairness" per Ward and Buxton LJJ in *Stanley Cole*. In order to do that the tribunal quite rightly approached the matter as they did and went on specifically to consider the relevant paragraphs of their original judgment relating to the critical question of whether it was just and equitable to extend time to permit the claim to be heard. The appeal tribunal could not see how the claimant's submissions in the paragraphs dealing with the just and equitable point could possibly have affected the original decision of the tribunal for the reasons they gave in their review judgment. It followed that there was no procedural breach which was "seriously irregular and unfair" or any "substantial unfairness". The employment tribunal had also given an accurate summary of the relevant law relating to apparent bias.

Deman v University of Bradford; 1 June 2006; EAT/80/06
EAT: Judge Birtles, Sir William Morris and Mr F Motture

UNFAIR DISMISSAL

An employee was suspended by her employer, a mediation and dispute resolution service, "pending an investigation into a conflict of interest" after the claimant had informed her line manager that her husband was setting up his own mediation service. She was invited to attend a disciplinary hearing, but given no information as to the charges. During the hearing, which the employers later accepted failed to adhere to the basic standards for conducting a disciplinary hearing, three charges emerged alleging that she had taken files relating to funding and had prepared a database of mediators. She was dismissed because she had "been found guilty of gross misconduct and improper practice". She appealed and was told at the appeal hearing that the appeal panel was there to consider any new points the claimant would like to bring to its attention and to find out if there was any new evidence. The panel upheld the original decision. On her claim of unfair dismissal the employment tribunal found that on the basis of the information before the disciplinary panel it had been entitled to reach the conclusions it did, and it dismissed the claim.

JUDGE REID QC, allowing an appeal by the claimant, said that the employment tribunal had expressed the view that the employee had been given every opportunity to state her case but had failed to do so. That finding was unsustainable. In *Byrne v BOC Ltd* [1992] IRLR 505 the Employment Appeal Tribunal held that, where the first stage of the disciplinary hearing was seriously flawed, it was essential, if the appellate process was to be treated as establishing fairness overall, that it should be able to stand on its own merits as conferring on the employee all the rights which should have been conferred at the initial stage, notably proper notice of the complaint and a full opportunity of stating the employee's case. In the present case the original hearing was seriously flawed. It was therefore necessary for the appeal hearing to be able to stand on its own merits as conferring on her all the rights to which she was entitled, but the claimant was told at the outset of the appeal that the panel was to "consider any new points". It was simply not a permissible conclusion on the evidence before the employment tribunal for it to hold that the appeal hearing made good the grave deficiencies in the original disciplinary hearing. It followed that the dismissal was unfair, and a finding of unfair dismissal would be substituted.

Baron v Bliss Mediation Services; 21 February 2006; EAT/454/05
EAT: Judge Reid QC, Ms P Tatlow and Mr M Worthington

WAGES

Following his dismissal on 4 March 2005, the claimant wrote to his employers requesting payment for overtime. On 15 April the employers paid him a sum which the claimant considered insufficient, and on 16 June he raised a grievance. An employment tribunal dismissed his claim for an unlawful deduction of wages under section 23 of the Employment Rights Act 1996 on the ground that the original three-month time limit for presenting the claim had expired on 3 June and, since the grievance had been raised after the time limit had expired, time had not been extended.

JUDGE ALTMAN, allowing an appeal by the claimant, said that it was argued that time did not start to run until 15 April 2005, as that was the date of the payment from which the alleged deduction had been made, and that the grievance was therefore in time. Where a claim was made for an unauthorised deduction it might be one of three types: a straightforward deduction, expressed to be so, a shortfall in a payment made, or no payment whatsoever. The only time limit provided by statute was in section 23(2)(a) of the Employment Rights Act 1996, and that did not state that time was to run from the date when the wages were payable. In *Delaney v Staples (trading as De Montfort Recruitment)* [1991] ICR 331, 339 the statute was broadened to interpret "deduction" as covering "non payment", and reliance was placed on what is now section 13(3) of the 1996 Act, though comments made by Nicholls LJ at p 340E–G did not appear to consider the impact of what he was saying on the actual time within the time limit provisions. It was clear that the payment made by the employers on 15 April 2005 came squarely within section 13(3), so that that was when the deduction was made and the date from which the time limit in section 23(2) started to run. Accordingly, the grievance raised just over two months later was in time. Where there was a complete non payment, rather than a shortfall, as in the present case, the Employment Appeal Tribunal in *Group 4 Nightspeed Ltd v Gilbert* [1997] IRLR 398 said: "It is only when an employer fails to pay a sum due by way of remuneration at the appropriate time, i e at the contractual time for payment, that a claim for unlawful deduction can arise." It would be wrong to apply that construction to the current situation and to say that time began to run when the contractual obligation arose; and it did not detract from the wording of the statute which, in circumstances where there had been an actual deduction, or a shortfall, made it clear that it was only when the payment had been made to which the deduction had been applied that time started to run. Accordingly, the position was that, where there had been an actual deduction in breach of contract, time started to run on the date the deduction was made, or on the date the payment from which the deduction was made was tendered. The same principle applied where there was a shortfall, and time started to run when the reduced payment was made. Where, however, there was no payment, time would start to run at the time when the contractual obligation to make a payment arose. A finding that the claimant's claim was in time would be substituted.

Arora v Rockwell Automation Ltd; 21 April 2006; EAT/97/06
EAT: Judge Altman

PRACTICE

An employee claimed that he had been unfairly dismissed for having blown the whistle on what he said was his employer's wrongdoing. The employment tribunal, having heard evidence from the claimant only, and in response to a submission from the employer, decided that he did not have the essential components for making a claim of whistle-blowing. It dismissed the claim and awarded £10,000 in costs.

JUDGE McMULLEN QC, allowing an appeal by the employee, said that the employee submitted that the tribunal had not given him an opportunity to be heard, for it stopped the case at half-time without allowing him to cross-examine the employer's witness. He contended that the central issue which he presented to the employment tribunal was his concern that his employer would be in breach of a statutory regime, by supplying equipment without a CE certificate. The approach in *ALM Medical Services Ltd v Bladon* [2002] ICR 1444 was to be followed in whistle-blowing cases. That was that there was a certain generosity in the construction of the statute and in the treatment of the facts. Whistle-blowing was a form of discrimination claim (see *Lucas v Chichester* EAT/713/04). As to when it was appropriate to accept a no case to answer submission, the correct approach was set out in *Logan v Customs and Excise Comrs* [2004] ICR 1, which approved, at paras 18 and 19, the summary of the law set out by the Employment Appeal Tribunal in *Clark v Watford Borough Council* (unreported) 4 May 2000. A cautionary approach on appeal had to be adopted where there was, as in the present case, inequality of arms. There was a great temptation for a litigant who presented his own case to stray from the strict confines which applied to professional advocates when advancing questions of law which related to matters already ventilated below. The appeal tribunal should not interfere with findings of fact properly made by an employment tribunal unless they were perverse. A finding as to whether a party acted reasonably was one of fact. But whether a person's belief was reasonably held implied an objective standard applied to a finding of fact as to what was believed. In the present case, the central question was: what did the employee believe? He believed that the employer would supply the equipment. There never was a CE marking for it. He was never shown the declaration of conformity which it appeared the employer would rely on for the absence of a CE marking. It was sufficient to hold that if someone complained of a lack of a CE marking, it was capable of being an allegation of wrongdoing. The employment tribunal took its eye of the central focus of the employee's complaint and misdirected itself. The tribunal had before it the components of a valid claim under section 43C of the Employment Rights Act 1996, all of which should be tested through evidence from the employer. The employee contended that there would be a breach by his employer if the equipment was introduced without the CE marking. Whether he was right about that, or whether the employer was right that it formed part of an incorporated piece of machinery, did not matter at the present stage. The legislation was there to protect him. The tribunal wrongly decided to cut short the case at half time. It was only in an exceptional case that a half-time submission in what was effectively a discrimination matter should be acceded to. It would be cost-effective and in accordance with the overriding objective to remit the case to the same employment tribunal. The costs order was set aside.

Boulding v Land Securities Trillium (Media Services) Ltd; 3 May 2006; EAT/23/06
EAT: Judge McMullen QC, Mr D Norman and Mr T Stanworth

PRACTICE

A claimant, whose claim of unfair dismissal was dismissed by an employment tribunal, asserted that she had not received a fair hearing, because the tribunal hearing had been fixed for two days but the chairman had only one day available and, instead of offering an alternative second day, the tribunal started the hearing at 11.15 a m and decided in effect to shoehorn the hearing into one day. As a result, the claimant said, she was unable to cross-examine her line manager, W, and to develop her case as she wished.

JUDGE BURKE QC, dismissing the claimant's appeal, said that, according to the statement of counsel representing the employer before the tribunal, the witness statements were taken as read. W was the first witness; after supplementary questions "in chief" and some questions from the tribunal, she was cross-examined until 1.15 p m when the tribunal adjourned for lunch. At that stage the chairman indicated that cross-examination would be limited to half an hour, for each witness, in pursuit of the overriding objective, and gave an indication of the questions which the tribunal would have to answer in dealing with the issue of fairness. On the chairman's timetable, the claimant's cross-examination of W was not limited at all; and her cross-examination of the other witnesses was completed well before any 30-minute limitation came into force. It was for the claimant to make good her disputed claim that the tribunal failed to grant her a fair hearing. Was the hearing unduly and unfairly shortened in such a way as to prevent the claimant from having a fair hearing? The appeal tribunal attached very great importance to the principle, now enshrined in article 6 of the European Convention on Human Rights, that every litigant was entitled to a fair hearing. It had to be acknowledged, however, that the tribunal had a discretion to exercise its case management powers, in relation to the manner in which the hearing proceeded, in such a way as was consistent with the overriding objective of dealing with a case justly, including, where practicable, ensuring that the case was dealt with in ways proportionate to the complexity and importance of the issues, as well as expeditiously and fairly: see rule 3(1) and (2)(b) and (c) of the Employment Tribunals Rules of Procedure 2004. The question was whether the tribunal by its case management decisions disabled itself from receiving relevant and significant evidence. The appeal tribunal were wholly satisfied, first, that the tribunal did take trouble to explain the procedure and the issues appropriately to the claimant; secondly, that there was no error of law in the manner in which the tribunal exercised its discretion to control the hearing and to finish it within one day; and, thirdly, that the course which the tribunal took did not prejudice the claimant unfairly, did not disable the tribunal from receiving relevant or significant evidence and did not create any unfairness. No question of shortening cross-examination arose until after W had completed her evidence. There was no reason to suppose that the claimant was prevented from making her points, if indeed she was so prevented at all, by the rushed nature of the proceedings, as she alleged them to have been. Such constraints arose from proper case management decisions or at least case management decisions which could not be criticised as having been made in error of law.

La Vertue v Ilex Energy Consultants Ltd; 16 February 2006; EAT/520/05
EAT: Judge Burke QC, Ms J Darke, Mr J C Shrigley

PROTECTED DISCLOSURE

A business studies lecturer who contended that a number of detrimental acts against him by his employer had been made on the ground that he had made protected disclosures resigned and made a claim of automatic unfair constructive dismissal contrary to section 103A of the Employment Rights Act 1996. At the pre hearing review the employment tribunal chairman struck out the claim under rule 18(7)(b) of the Employment Tribunals Rules of Procedure 2004 on the ground that, on the basis of the facts set out in the claim, the claimant had not made a qualifying disclosure. The disclosures concerned the behaviour of J, a predecessor of the claimant, who, he was told by the students, had divided the class into Islamic and non-Islamic groups and taught religious studies to the former while ignoring the latter. J had also told the Islamic group that he wished that a September 11 incident would occur in London and indicated his happiness with the events in New York. The claimant had felt that those observations amounted to a threat to national security and a possible criminal offence of incitement to racial hatred and he had reported them to, inter alia, the police.

JUDGE PETER CLARK, dismissing an appeal by the claimant, said that section 43B(1)(a) of the 1996 Act provided: "a 'qualifying disclosure' means any disclosure of information which, in the reasonable belief of the worker making the disclosure, tends to show one or more of the following—(a) that a criminal offence has been committed, is being committed or is likely to be committed . . ." Section 18(1) of the Public Order Act 1986 provided: "A person who uses threatening, abusive or insulting words or behaviour . . . is guilty of an offence if—(a) he intends thereby to stir up racial hatred, or (b) having regard to all the circumstances racial hatred is likely to be stirred up thereby." Section 17 defined "racial hatred" as meaning "hatred against a group of persons . . . defined by reference to colour, race, nationality (including citizenship) or ethnic or national origins". There was no doubt that, for the purposes of section 43B(1)(a), section 18 of the 1986 Act gave rise to a criminal offence. The question was not whether J might have some defence to a criminal charge under section 18 which might not have occurred to the claimant, but whether the set of facts which he reasonably believed existed could possibly constitute the offence. Only if there was no reasonable prospect of his establishing that the facts could constitute the offence could his claim properly be struck out as misconceived under rule 18(7)(b). That involved a careful analysis of the facts pleaded and relied on by the claimant. Accepting that J's comment that he wished to see a 9/11 incident in the UK was capable of amounting to threatening words, the real question, identified by the chairman, was whether such words were capable of evincing an intention to stir up racial hatred, i e hatred against a racial group. The racial group against whom the 9/11 remark was directed was simply not identified. It was not British citizens, but the group of students consisting of Jews and white Europeans. However, that group emerged from the division of the class into Islamic and non-Islamic students, a division based on religion, not race. The chairman was entitled to find that the words relied on were, on the claimant's pleaded case, not directed to any racial group so as to found a reasonable belief that a section 18 offence had been, was or was likely to be, committed. The claim based on a section 43B(1)(a) qualifying disclosure had no reasonable prospect of success. It was trite law that the case could only be decided on the claim as formulated by the claimant. Whether or not the claim could have been formulated in a different way so as to pass the section 43B hurdle at the strike-out stage was nothing to the point. Accordingly the appeal failed.

Babula v Waltham Forest College; 17 May 2006; EAT/635/05
EAT: Judge Peter Clark

TIME LIMIT

An employee, who had already lodged a grievance with his employers, resigned as from 20 June 2005. On 20 December 2005 he presented a claim for unfair constructive dismissal which was accepted by the employment tribunal as being in time on the basis that under regulation 15(1) of the Employment Act 2002 (Dispute Resolution) Regulations 2004 the time for making the claim, prescribed by section 111 of the Employment Rights Act 1996, was extended by three months from the date on which it would otherwise have expired.

JUDGE BIRTLES, dismissing an appeal by the employers, said that the employers argued that under section 111 of the 1996 Act the three month period commenced with the effective date of termination which made the last day for presentation of the employee's claim 19 September 2005, and that, following the approach of the Court of Session in *Pacitti Jones v O'Brien* [2005] IRLR 888, the correct interpretation of regulation 15(1) of the 2004 Regulations was to add a period of three months to 19 September, which meant that the last date on which the employee could present his claim was 19 December 2005. *Pacitti Jones v O'Brien*, however, was concerned with the proper construction of section 108(1) of the 1996 Act and could on that basis be distinguished from the present case. Section 108(1) provided that the right not to be unfairly dismissed did not apply to the dismissal of an employee unless he had been continuously employed for a period of not less than one year beginning with the effective date of termination. In construing the meaning of "one year" for the purpose of calculating continuous employment, the Court of Session looked at section 211(1) of the Act which made it clear that the day on which the employee started work was to be included in the reckoning. It was important to remember that the present case involved construction of regulation 15(1) of the 2004 Regulations and not section 108(1) or section 211(1) of the 1996 Act. There was a clear difference of statutory language. Section 211(1) stated an employee's period of continuous employment "begins with the day on which the employee starts work". That was quite different from regulation 15(1) which specifically identified the starting point to be the day *after* the expiry of the normal limitation period and then extended it for three months beginning with that date. The effect was to extend the period of three months from the day after the expiry of the normal time limit. The normal time limit expired on 19 September 2005, the day after that was 20 September and three months from that date gave an extension of time to 20 December 2005. The claim was lodged on that date and it was in time.

Singh (trading as Rainbow International) v Taylor; 27 June 2006; EAT/183/06
EAT: Judge Birtles

UNFAIR DISMISSAL

An employee who was dismissed after a long period of post-accident sickness, including a phobic anxiety about returning to the workplace, had his complaints of unfair dismissal and disability discrimination upheld by an employment tribunal. The employee had sustained a serious accident at work for which the employer had admitted liability. Over a year later the view of a specialist occupational physician instructed by the employer had been that there was no prospect of the employee returning to his work with the employer in the foreseeable future as a result of his psychiatric condition, but advised obtaining a report from the employee's GP. Meanwhile the employer offered to refer the employee to a private psychiatric clinic. The employee's response was that he was not interested, that he had started to see a clinical psychologist and had found the experience beneficial. The tribunal found that no reasonable employer would have dismissed the employee without further inquiry.

JUDGE BURKE QC, allowing in part an appeal by the employer, said that the employer accepted that the tribunal had set out the correct test for unfair dismissal, but submitted that it had erred in applying it. While the tribunal might have overstated the position when describing the physician's report, there was no doubt that he clearly advised the employer that a report from the GP was appropriate, and the tribunal found that the employer had relied on the adverse views as to the prospect of a return to work and ignored the qualification that a further report be obtained. That was a view the tribunal was entitled to form. Furthermore, the tribunal was entitled to conclude, on the evidence, that no reasonable employer would, on the one hand, have held out the offer of the private clinic and yet, on the other hand, have been unwilling to wait for a relatively short period to see the outcome of the employee's course of treatment with the psychologist, or at least obtain from him an opinion as to prognosis, before proceeding to dismissal. The evidence provided material on which a reasonable tribunal could properly reach the conclusions which were the basis of the tribunal's decision that the dismissal of the claimant was not within the range of reasonable responses to the situation with which it was presented when it came to dismiss the employee. For those reasons the appeal against the tribunal's decision as to unfair dismissal failed. But the appeal against the tribunal's conclusion that there had been disability discrimination would be allowed and the award of compensation under that head set aside. Only three allegations of discrimination were pursued before the tribunal and the tribunal had found against the employee in respect of all three; and the employee did not seek to suggest that the finding of discrimination, which was based on an act of discrimination which had neither been pleaded nor relied on, was sustainable.

Airbus UK Ltd v Wilson; 25 April 2006; EAT/61/06
EAT: Judge Burke QC, Mr T Stanworth and Mr D Welch

[2006] ICR Part 11

AMENDMENT

A claimant sought leave to amend his claim for unfair dismissal, six months after his dismissal and four months after presenting his claim, by adding a further respondent on the ground that as a result of a transfer of an undertaking the additional respondent was liable to compensate him. The employment tribunal granted leave to amend on the basis that the claimant was not adding a new claim and that it was just and equitable to permit him to do so.

LADY SMITH, allowing an appeal by the respondents, said that the reference in *Skelkent Bus Co Ltd v Moore* [1996] ICR 836, 843, to what had to be considered if a new cause of action was proposed to be added, had to be read as meaning that when such an amendment was being considered the tribunal should take into account as a highly relevant factor, in exercising its discretion under rule 10(2)(q) of the Employment Tribunals Rules of Procedure 2004, the fact that it was being proposed outwith the period prescribed by section 111 of the Employment Rights Act 1996. It was not suggested that there was an absolute rule that an amendment for such a purpose could never be allowed beyond that period, but it was indicative of the view being that a tribunal ought to afford considerable weight to its lateness. It should be recognised that once leave was granted the new respondent could not argue that the claim was time barred, since the claimant had the benefit of one single start date for section 111 purposes, namely the date his claim was lodged with the tribunal, even though it was not directed at the new respondent at that point. In *Gillick v BP Chemicals Ltd* [1992] IRLR 437 the Employment Appeal Tribunal observed that there was no time limit as such when what was proposed was the addition of a new or substitute respondent to a timeously lodged claim. While it was implicit in what was said in *Gillick* that it would be incumbent on a claimant to provide a persuasive explanation for the lateness of the addition of a party as a new respondent, the tribunal had a discretion to allow the amendment even beyond the end of the statutory period for lodging the claim. Although the appeal tribunal appeared to have had some sympathy with the view that the fact that the new respondent was not connected with the original respondent did not rule out an amendment, it appeared to have had in mind the granting of leave to add an unconnected respondent in a case where there had been a genuine mistake, not a change of mind by the claimant as to whether the new respondent was required to be brought in. It seemed reasonable to infer that the appeal tribunal anticipated it being much less likely that the discretion would be exercised in the claimant's favour if that was what had happened. It was incumbent on the employment tribunal to consider the whole surrounding facts and circumstances. In so doing it was required to assess whether the claimant was seeking to alter the basis of an existing claim against the existing respondent without purporting to raise a new distinct head of complaint; whether he was seeking to substitute a new cause of action but one that was linked to or arose out of the same facts as the original claim; or whether it was an amendment which sought to substitute a wholly new claim unconnected to the original claim. If it was a new complaint it would be open to the tribunal to regard that as an important factor weighing against grant if it was outwith the time limit, and the tribunal would need to look at the explanation for why that had occurred and to consider whether there would be injustice or hardship to the claimant if the application was refused or to the proposed respondent in being brought in at that stage if it was allowed. In the present case the tribunal had put to one side an approach that involved looking for justification for lateness of the new claim and found that the claimant was not adding a new ground of claim. But it was quite plain that the claimant was seeking to bring in a new respondent who was separate and distinct from the existing respondents. The claim he was seeking to make was not that the new respondent was his employer and had unfairly dismissed him but that the Transfer of Undertakings (Protection of Employment) Regulations 1981 applied so as to make the new respondent heir to his claim against the first respondents for having unfairly dismissed him. That claim was a new claim unconnected with the original claim, and the tribunal had misapprehended the position in which it found itself. The case would be remitted to a new tribunal for rehearing.

Argyll & Clyde Health Board v Foulds; 25 August 2006; EATS/9/06
EAT(Sc): Lady Smith

APPEAL

An employment tribunal upheld a complaint by a union that the respondent employer was in breach of its obligation to consult imposed by section 188 of the Trade Union and Labour Relations (Consolidation) Act 1992 when implementing a job evaluation scheme by dismissing employees and re-engaging them on less favourable terms and conditions. The Employment Appeal Tribunal dismissed an appeal by the employer in relation to one group of employees while varying the amount of the protective award in respect of another group.

LAWS LJ, dismissing an appeal by the employer, said that one of the issues for the employment tribunal was to decide when the obligation to consult the union arose. The tribunal said: "once the duty to consult arises consultation must begin in good time (i e speedily) *after* that date rather than in good time *before* what might still be a far distant end date." The employer sought to challenge that construction of "in good time" in section 188(1A) of the 1992 Act, submitting that it meant in good time before the proposed dismissals took effect. But no such submission had been made to the employment tribunal and the Employment Appeal Tribunal had refused to allow the point to be taken on appeal. It was not disputed that such consultation as there was began on 20 December 2002 and the first notices of termination went out on 30 December 2002 and that the consultation was begun more than 90 days before the first dismissals took effect. The appeal tribunal referred to well established jurisprudence, in particular *Jones v Governing Body of Burdett Coutts School* [1999] ICR 38, to the effect that it should only allow a new point of law to be taken in exceptional circumstances. Such a point was not to be taken merely because it seemed to be, or even was shown to be, a good one. The employer advanced three arguments in support of there being exceptional circumstances: the point was important and it was in the public interest to have it decided; it was a high value award which could cost council taxpayers a seven figure sum; and if its construction were upheld new findings of fact would not be required to resolve the case. In his Lordship's judgment, nothing had been shown to demonstrate that the case was of an exceptional nature. The high value of the claim could not make it so. There might be a case in which there was a pressing public interest to have a particular point decided, and that might prevail as an exceptional circumstance, but the employer's claim of an overriding public interest was greatly undermined if the union was right to submit that a decision in the employer's favour on the construction issue would require further consideration by the employment tribunal. It seemed that the union was right so to submit. Whether consultation took place in good time was a matter of fact and degree, and an evaluation of the detailed facts could only properly be undertaken by the specialist first instance tribunal. In the circumstances the appeal tribunal was quite right to decline to allow the fresh construction point to be taken. Indeed, to have allowed it would have been unjustified on authority.

BROOKE and SCOTT BAKER LJJ agreed. A cross-appeal by the union against the reduction of its award was allowed.

Leicestershire County Council v Unison; 29 June 2006; [2006] EWCA Civ 825
CA: Brooke, Laws and Scott Baker LJJ

PRE-HEARING REVIEW

An employee who was dismissed when her employers went into administration complained of both automatically unfair (TUPE) dismissal and, alternatively, ordinary unfair dismissal on the basis either that there had been no genuine redundancy, or that she had been unfairly selected for redundancy by the administrators. The claim was brought against the employers, as first respondents, and the company that subsequently took over the store where she had worked, as second respondent. The case was listed for a pre-hearing review before a chairman alone "to determine whether the claimant was employed by the second respondent". At the pre-hearing review the chairman decided that there had been a transfer of the claimant's employment to the company by virtue of TUPE and he dismissed the claim against the employers.

COX J, allowing an appeal by the second respondent, said that, notwithstanding the second respondent's submissions that it was not in dispute that the claimant's employment had been terminated several weeks before they had taken possession of the store, the chairman expressed the view that her employment (as distinct from a liability in respect of its termination) could have been transferred to the company under the TUPE provisions. He therefore decided to proceed to determine that there had been a TUPE transfer, though, on the basis of the pleadings and the undisputed facts, that was irrelevant to the question whether the claimant was employed by the company. While it was correct that what was important at tribunal hearings was the evidence adduced rather than the parties' pleadings, parties were entitled to prepare for those hearings on the basis of the contents of the pleadings, which informed them as to the case they had to meet, and on the basis, where relevant, that particular pleaded facts were not in dispute. The requirements of cost effective preparation and concentration on the core issues to be tried at a hearing applied to all those involved in the conduct of litigation, including litigation in employment tribunals. On the pleaded facts, which were not in dispute, a TUPE transfer could not have transferred the claimant's employment to the company, but only the company's liability for termination, the question of transfer and the reason for and fairness of the claimant's dismissal being issues required to be determined at a hearing in the usual way. It was clear that as soon as the hearing began, and throughout the discussions which then took place, there was no meeting of minds between the company's representative and the chairman as to the scope of the issue to be determined and the reason for the pre-hearing review. The issue determined by the chairman, i e whether or not there was a transfer of the claimant's employment from the first to the second respondent by virtue of TUPE, was not the issue which had been identified by the tribunal in notifying the parties of the pre-hearing review. Where a transferee did not take on the transferor's employees because they had already been dismissed by the transferor then the transferee was obliged to meet all the transferor's contractual and statutory obligations unless there was an economic technical or organisational reason for the dismissal entailing changes in the workforce. The liability transferred by virtue of TUPE was a liability to pay damages for wrongful dismissal or to comply with an order under the relevant employment legislation for unfair dismissal. Against that background the tribunal's notification of a short pre-hearing review, with the chairman sitting alone and with a time estimate of just one hour, to determine whether the claimant was employed by the second respondent and with no directions for disclosure or for exchange and filing of witness statements, would reasonably indicate that it was a straightforward issue to be disposed of on the face of the pleadings. The chairman's subsequent reconstruction of the issue to be decided was in error. The chairman erred in proceeding to determine the transfer issue in circumstances where it must have been clear to him that the company had not come prepared to deal with that issue and where it meant that he would be enlarging the ambit of the hearing beyond the straightforward issue identified and as arose from the pleaded facts. In the circumstances he ought to have adjourned the hearing in the interests of fairness, to enable the company to prepare accordingly, and to have given appropriate directions to the parties.

Primark Stores Ltd v Beck; 7 July 2006; EAT/209/06
EAT: Cox J, Dr B V Fitzgerald and Mr P M Smith

WORKING TIME

A claim by a guest care manager employed by a hotel company, for payment in respect of the several nights each week he was required to sleep in the hotel to cover emergencies, such as fire or flood, was dismissed by an employment tribunal, which found that he was not at the employers' disposal during periods of sleep-over and was not entitled to be paid therefor unless he carried out any work.

LADY SMITH, allowing an appeal by the claimant, said that under the claimant's contract of employment he was entitled to be paid at an hourly rate for those hours that he was, in furtherance of his duties under the contract, working. That was a question of mixed fact and law. The claim was a contractual one; in particular, it was not advanced as a claim under either the Working Time Regulations 1998 or the National Minimum Wage Regulations 1999. But that was not to say that certain authorities in which those Regulations had been considered were of no assistance. In *Scottbridge Construction Ltd v Wright* 2002 SLT 1356, the fact that the employer required the employee to be on his premises during the nightshift hours was regarded as a key factor and it did not matter that his actual period of activity amounted to a small proportion of the hours in attendance. In *Landeshauptstadt Kiel v Jaeger* (Case C-151/02) [2004] ICR 1528, a case involving on-call doctors sleeping at their hospitals, the European Court of Justice found that the decisive factor in considering whether that was working time or not was that the doctors were required to be present at the place determined by the employer and to be available to the employer in order to provide services immediately in case of need. The court drew a distinction between those circumstances and cases where a doctor was required only to be contactable. *MacCartney v Oversley House Management* [2006] ICR 510 did not detract in any way from the above principles. It was not possible to extract a stand alone principle from *MacCartney* to the effect that if the likelihood of call out was so insignificant as to be trifling then the employee could not be regarded as working. What was also plain from a review of the authorities was that an employee could be regarded as working even though asleep and would be so regarded if the place where he was sleeping was his employer's premises and the reason he was sleeping there was that his employer required him to be in those premises for the employer's purposes. The claimant was clearly subject to his employers' requirement throughout the sleep-over periods. The reason that he slept over in the hotel was that the employers were under an obligation to have at least two employees present there overnight for health and safety and fire regulation purposes. The requirement that the claimant remain in the hotel premises during sleep-over periods was of such significance that he was liable to and indeed had been disciplined in the event of his leaving the hotel at any time during such a period. That was in circumstances where the claimant's own home was not far away. It was, however, clearly not sufficient for the employers' purposes that the claimant be at home and on call. He had to be in the hotel. The fact that he was there met a need of the employers. Being present in the premises was, primarily, what he was employed to do during sleep-over periods. That was, accordingly, his "work". The tribunal was in error in taking the view, as it did, that he could only be regarded as working if he was carrying out some specific activity during a sleep-over period. That approach simply missed the point. There was no need to remit the case back to the tribunal. It had made sufficient findings for the correct award to be made by the appeal tribunal.

Anderson v Jarvis Hotels plc; 30 May 2006; EATS/62/05
EAT(Sc): Lady Smith

CONTRACT OF EMPLOYMENT

An employment tribunal held that a claimant, who had been employed by the respondent as a staff reporter, covering foreign news, from 1993, was not continuously employed for the purposes of an unfair dismissal claim under section 98 of the Employment Rights Act 1996 after 2002, when he opted for a one-year contract, renewed in 2003, to provide his services on a freelance basis. Under the contract the respondent agreed to provide the claimant with a minimum of 100 days' work at $1,000 per day, the claimant was not obliged to accept any assignment offered but there were restraints on his working for competitors. The respondent did not compel any reporter to cover a war zone, and after 1997 the claimant had declined such assignments, and that was one reason for his contract not being renewed in 2004. The employment tribunal found that the claimant had been dismissed for a reason falling within section 100(1)(c) of the 1996 Act and his dismissal was automatically unfair under section 105(3).

JUDGE PETER CLARK, allowing an appeal by the respondent and a cross-appeal by the claimant, said that the first question was whether throughout the relevant period the claimant was employed by the respondent under a contract of employment for the purposes of section 212 of the 1996 Act. It was well established that the irreducible minimum of mutual obligation was necessary to create a contract of service. Under both the 2002 and 2003 contracts the respondent was obliged to provide the claimant with 100 days worked, or, if not, 100 days' pay at the agreed rates. For his part the claimant could decide whether or not to accept the assignments offered to him but was to do so in good faith. Thus the respondent did not have an unfettered right to offer no work or pay and the claimant did not have an unfettered right to refuse assignments. As a pure matter of construction of those contracts, the necessary mutuality was present, and the employment tribunal was wrong in law to find it was absent. The contracts were contracts of service, taking into account: that the respondent accepted that when working the claimant worked under a contract of employment; the degree of control exercised by the respondent over his work; his place in their organisation; the restrictions on his working for competitors; and the requirement that he keep the respondent advised of his commitments outside the agreement. Accordingly, the claimant was continuously employed by the respondent from 1993 to 2004, and the cross-appeal, on that issue, would be allowed. The reasoning of the employment tribunal in concluding that the reason, or the principal reason, for the claimant's dismissal fell within section 100(1)(c) was that, although the claimant was not required to and did not visit war zones after 1997, nevertheless he raised the circumstances of danger involved in such work with the respondent and those were circumstances "connected with his work". Both Directive 89/391/EEC and section 100(1), which implemented the Directive, were concerned with victimisation of those who raised issues about health and safety. It was the raising of the issue that was protected by section 100(1)(c), not the safety of the employee. The employment tribunal had confused the two when considering section 100(1)(c). The safety of the employee was dealt with at section 100(1)(d) and (e). The tribunal held that the principal reason for dismissing the claimant was "his refusal to go to war zones". The reality was that that reason was not one falling within the statutory provision. The employment tribunal found that there could be no claim under section 100(1)(d) and (e) because the danger was not such that the claimant could reasonably believe it to be "imminent". It was argued by the claimant that, since danger in war zones was ever present and correspondents were expected to go there "at the drop of a hat", it was imminent so as to engage paragraph (d) or (e). But the claimant was under no obligation to visit war zones. He chose not to do so and was thus in no danger, let alone imminent danger, nor could he reasonably believe otherwise. Accordingly, the finding of automatic unfair dismissal would be set aside, but the claimant was able to pursue his claim of unfair dismissal under section 98, and that claim would be remitted to the same employment tribunal.

ABC News Intercontinental Inc v Gizbert; 21 August 2006; EAT/160/06
EAT: Judge Peter Clark, Mr T Haywood and Ms B Switzer

HARASSMENT

An employee claimed against her former employer that throughout her employment she was the victim of harassment and victimisation, that the employer was negligent in its response to the stress to which she was subjected in the workplace and that she had suffered psychiatric injury as a result.

MACKAY J, dismissing the claim, said that the claimant set out 11 instances of alleged acts of harassment under the Protection from Harassment Act 1997. The only area of law in significant dispute was whether the employer was right to submit that in a case of vicarious liability for harassment by an employee the claimant still had to prove either a course of conduct by a particular employee, or by a group of employees acting with a common purpose in what could be called a joint venture. The claimant read para 59 of Auld LJ's judgment in *Majrowski v Guy's and St Thomas's NHS Trust* [2005] ICR 977 as helping her argument that any acts of harassment by any employee combined might as it were be aggregated with a failure by the employer to take steps to guard against such abuse so as to give rise to vicarious liability under the Act. His Lordship preferred the employer's argument. There had to be an established case of harassment against at least one employee who was shown on at least two occasions to have pursued a course of conduct amounting to harassment, or by more than one employee each acting on different occasions in furtherance of some joint design. Auld LJ talked of vicarious liability attaching to "harassment in breach of the Act", which meant that an individual or group had, as a precondition, to be shown to have broken the terms of the Act, so as to establish primary liability for which the employer would be vicariously liable, provided their acts in breach had a sufficiently close connection with the nature of the employment. [His Lordship reviewed the evidence and concluded:] The first six allegations of harassment were, inter alia, out of time; the seventh did not happen; the eighth was an isolated event and lacked the degree of seriousness required; the ninth concerned remarks neither of which were made; the tenth was not explored in evidence; and the claimant's account of the eleventh was rejected. There was, accordingly, no substance in the claim based on the 1997 Act. In respect of the claim in negligence, there was no breach of duty which caused the harm, nor indeed even any occupational stress properly so called.

Daniels v Comr of Police of the Metropolis; 5 July 2006; [2006] EWHC 1622 (QB)
QBD: Mackay J

STRIKING OUT

An employment tribunal chairman struck out claims of unfair dismissal arising out of the claimants' selection for redundancy, on the basis that they had not been actively pursued and that there had been a failure to comply with orders of the tribunal for provision of schedules of loss and for exchange of witness statements.

COX J, allowing an appeal by the claimants, said that the basis of the appeal was that the chairman erred in striking out the claims in circumstances where a lesser and more proportionate sanction ought to have been imposed and in finding, as he did, that a fair trial was no longer possible. The power to strike out a claim was contained in rule 18(7) of Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004. When exercising any power given to it by the Regulations a tribunal was required by regulation 3 to seek to give effect to the overriding objective, which was to enable tribunals and chairmen to deal with cases justly. It was common ground on the authorities that before there could be a strike-out of a claim, or indeed of an employer's response, there had to be a conclusion by the tribunal, on inquiry, that a fair trial was not still possible. At the pre-hearing review on 10 August 2005, the chairman expressly restricted his consideration of that important question to a "fixed moment of fairness", namely whether a fair trial could take place on 18 and 19 August 2005, the dates fixed for hearing, rather than whether, in all the circumstances, a fair trial was still possible if the hearing was adjourned to another date and appropriate directions given in terms of pre-trial preparation. It was not immediately obvious that the hearing could not have gone ahead on the dates fixed, in any event, with orders or unless orders for short service of the witness statements and schedules within two or three days. While one had considerable sympathy for the chairman's view that compliance with tribunal orders, made to ensure fairness as between the parties and to avoid delays, was not to be regarded as optional, striking out a claim and thereby debarring a claimant from access to a judicial determination of his complaint was a Draconian measure. As such it should be applied in general as a last resort, the final tool in the range of sanctions weaponry available to tribunals to tackle the wide range of abuses or failures by defaulting litigants. A proportionate response required the chairman to consider whether there was a less drastic means of addressing the claimants' failures and achieving a fair trial. Undoubtedly, an adjournment of the hearing, with appropriate unless orders and costs penalties, would have avoided the conclusion that a fair trial was impossible and would thereby have ensured fairness and justice as between the parties without debarring the claimants from a trial altogether. In observing that no request for an adjournment had been made, and in then limiting his consideration only to the question whether a fair trial was possible on the dates fixed for hearing, the chairman was in error. He was himself under an obligation to consider and determine both whether a fair trial was still possible and the proportionality of the response to the claimants' default, whether or not factors or applications relevant to that determination were raised by the parties themselves. There was here no element of fraud, destruction of evidence or wilful misconduct, the claimants' default consisting essentially of inactivity and delay. While such tardiness and non-compliance with orders should clearly be the subject of both censure and sanction, there was a need to consider a proportionate response even in the face of wilful disregard of procedural orders. The claims would be reinstated and remitted for further directions and determination by the employment tribunal.

Ridsdill v D Smith & Nephew Medical; 17 July 2006; EAT/704/05
EAT: Cox J

TRANSFER OF UNDERTAKING

An employment tribunal held that there two clear economic entities which had retained their identities when two service contracts, on which claimant employees had been engaged, were not renewed and new contracts for those services were awarded to the first and second respondents, respectively, and that, accordingly, the claimants' employment had transferred to the relevant respondent under the Transfer of Undertakings (Protection of Employment) Regulations 1981 ("TUPE"). The Employment Appeal Tribunal dismissed an appeal in respect of the second contract, while remitting the case in respect of the first contract on the ground of insufficient reasons.

BUXTON LJ, dismissing an appeal by the second respondent, said that there were two particular complaints about the employment tribunal's reasoning. First, it was said that the decision did not comply with rule 30(5) of the Employment Tribunals Rules of Procedure 2004. In future employment tribunals would be well advised to recite the terms of that rule and to indicate serially how their determination fulfilled its requirements. But the rule was intended as a guide and not a straitjacket. Provided it could be spelt out from the determination of a tribunal that what rule 30(5) required had been provided, then no error of law would be committed. Secondly, it was said that the employment tribunal had relied on the agreed statement of facts without specifically analysing how they related to the issues before it. Those matters would be borne in mind when turning to the various issues identified in the grounds of appeal. The Employment Appeal Tribunal had said that the employment tribunal had been entitled to conclude that there was an organised body of resources which, in particular, relied as a significant element on the skills of the workforce as being necessary. His Lordship agreed. Then it was said that the tribunal erred in equating work under a contract with an economic entity. What had to be shown was that an economic entity was transferred, and that was what the employment tribunal had found as a fact after applying the multifactorial approach that *Süzen v Zehnacker Gebäudereinigung GmbH Krankenhausservice* (Case C-13/95) [1997] ICR 662 required. The next ground complained that the economic entity involved was not a *stable* entity; that there was no guarantee that the contract would continue. His Lordship agreed with the Employment Appeal Tribunal's analysis. An enterprise might be stable as a matter of practical and industrial reality, even though its long-term future was not assured. Under ground 4, it was submitted that the Court of Justice had held as a matter of law that it was necessary to distinguish between "labour intensive" and "asset dependent" operations, and when the latter were in issue failure to transfer the assets would mean that there was no transfer in TUPE terms, relying on *Liskojarvi v Oy Liikenne Ab* (Case C-172/99) [2002] ICR 155, and para 42 in particular. His Lordship had considerable doubts whether the Court of Justice intended to lay down a rule as stark as that contended for and was impressed by the view of the Court of Session in *Scottish Coal Co Ltd v McCormick* 2005 SC 105, para 35. The instant case, however, presented an issue not addressed in the Court of Justice authorities, where the assets used by the former business were leased. They were better categorised as tools and equipment rather than assets in the technical sense, and it was difficult to see them as an integral part of the former business. Even, therefore, if there were a rule as absolute as that contended for by the second respondent on the basis of *Oy Liikenne*, it was difficult to see how exactly "transfer" of the assets would operate, or how the existence of those assets could override the general obligation to approach the case on a multifactorial basis. But it was clear that the employment tribunal had found that the workers were a very important factor in the contract and the assets were not of the essence of the contract. The answer to the question of the transfer of the undertaking followed from the identification of the undertaking, and the employment tribunal's clear finding that the same work was being carried out by almost the same people with the same objectives was conclusive.

MAURICE KAY LJ and **SIR PETER GIBSON** delivered concurring judgments.

Balfour Beatty Power Networks Ltd v Wilcox; 20 July 2006; [2006] EWCA Civ 1240
CA: Buxton, Maurice Kay LJJ and Sir Peter Gibson

UNFAIR DISMISSAL

The managing director of a company was dismissed for gross misconduct after he included his wife's air fare, when she accompanied him on an overseas trip, in his business expenses. On his complaint of unfair dismissal, an employment tribunal found that the principal reason for the dismissal was not dishonesty but the relationship between the claimant and the other directors who wanted him to step down as managing director and used the matter of the air fare to justify his dismissal. The tribunal concluded that the company had not demonstrated a fair reason for dismissal for the purposes of section 98(1) of the Employment Rights Act 1996 and it upheld the complaint.

JUDGE SEROTA QC, dismissing an appeal by the company, said that it was submitted on behalf of the company that the reason for a dismissal was a set of facts known to the employer and that there was, therefore, a need to examine the subjective mind of the employer, and reference was made to the well known judgment of Cairns LJ in *Abernethy v Mott, Hay and Anderson* [1974] ICR 323, 330, approved in by the House of Lords in *W Devis & Sons Ltd v Atkins* [1977] ICR 662, 677. In *ASLEF v Brady* (unreported) 31 March 2006 Elias J said: "So the question is: why did the employers dismiss him? If the principal reason was the act or acts of misconduct, then the requirements of section 98(1) are met. If, on the other hand, there was some other reason, they will not be." It was submitted that, the tribunal having found that making the expenses claim was an "arrogant and improper act" justifying a 40% reduction in the claimant's compensation, there were reasonable grounds for the company's belief in his misconduct. It was not controversial that the company had to show the reason for dismissal and that, if it was to succeed in demonstrating that the dismissal was fair, the reason had to be a fair one within the meaning of section 98 of the 1996 Act. In *ASLEF v Brady* Elias J said, at para 73: "there is no reason in principle why the dismissal cannot be unfair even where misconduct has been committed. The question is whether the misconduct was the real reason, and it is for the employer to prove that." Elias J pointed out that it was not incumbent on the tribunal to make any findings as to the actual reason for the dismissal at all, saying, at para 76, that it was sufficient for the tribunal to say that it was not satisfied that the real reason was a statutory reason, and, at para 79, that even a potentially fair reason might be the pretext for a dismissal for other reasons. Counsel for the appellant company had submitted that those passages from *ASLEF v Brady* were obiter and should not be followed. The appeal tribunal did not accept that and considered that it should follow that judgment. It was clear that the employment tribunal found the dismissal to be opportunistic and that the principal ground was not the claimant's conduct but his relationship with his fellow directors, and there was ample evidence to support that conclusion.

East Lancashire Coachbuilders v Hilton; 24 August 2006; EAT/54/06
EAT: Judge Serota QC, Ms V Branney and Mr P A L Parker

DISMISSAL PROCEDURES

After two investigatory meetings, concerning an incident when the employer believed that an employee had intended to drive a company vehicle after consuming alcohol, which he knew would be in breach of company rules, the employee was required to attend a disciplinary meeting by a letter which stated that the question of disciplinary action would be considered with regard to "using a vehicle for social purposes; conduct which fails reasonably to ensure health and safety of oneself and others; insubordination; a breach of the company vehicle regulations and procedures". After the hearing the employee was dismissed for misconduct. Dismissing his claim of unfair dismissal, an employment tribunal also rejected the employee's contention that there had been a failure by the employer to comply with the standard dismissal and disciplinary procedures in Part 1 of Schedule 2 to the Employment Act 2002 and his dismissal was automatically unfair under section 98A(1) of the Employment Rights Act 1996.

JUDGE BURKE QC, dismissing an appeal by the employee, said that, contrary to the submissions of the employee, when the tribunal's reasons were read as a whole, the basis of their decision as to the relevant rule and as to the material breach of that rule were sufficiently clear to tell the parties why respectively they had lost or won and to satisfy the requirements set out in *English v Emery Reimbold & Strick Ltd (Practice Note)* [2002] 1 WLR 2409. On the question of compliance with the statutory procedure, though the decisions of the Employment Appeal Tribunal thus far appeared to have involved consideration of the grievance procedures set out in Part 2 rather than Part 1 of Schedule 2 to the Employment Act 2002, the general approach was likely to be the same. Section 98A of the 1996 Act and section 32 of the 2002 Act were parallel provisions. The judgment of the Employment Appeal Tribunal in *Alexander v Brigden Enterprises Ltd* [2006] ICR 1277, paras 33–39, 49, marked out the principles by which the present appeal should be decided. The employee accepted that the various steps of the statutory procedure might be taken in any order and that the information required by step 2 need not be given in any particular form. In practice, because regularly employers held investigatory meetings or interviews with an employee whose conduct they were considering before deciding whether to go forward with disciplinary proceedings, it was likely that step 2 might often be complied with before step 1. In a case in which complaint was made that both step 1 and step 2 had not been complied with it would be an error of law for the tribunal to consider generally whether the purposes of the statutory procedures, as described in para 34 of *Alexander*, had been complied with and whether the procedures as a whole had been complied with, without considering compliance with step 1 separately from compliance with step 2. However, in the present case, the tribunal did not make that error. They considered step 1 and step 2 separately and expressly considered the sequence in which the steps might be complied with and the fact that the requirements of step 1 were that there should be a document, whereas the requirements of step 2 did not involve anything in writing. If and in so far as the tribunal found that the letter by itself was sufficient compliance with step 1, they were right to do so: the letter satisfied the requirements identified in *Alexander*, at para 38, namely to state the issue in broad terms and identify the general nature of the misconduct alleged. Where, however, a tribunal regarded the words of a document said to constitute compliance with step 1 as ambiguous, or were doubtful as to whether the words were sufficient to amount to compliance, the tribunal were entitled to look at the whole context in order to resolve such ambiguity or doubt. But compliance with step 1 had to be considered separately, and a defective document could not be regarded as complying simply because the employer had fully complied with step 2, while it was legitimate to take into account whether the document would have been seen by the employee to have been ambiguous or to have left him in doubt. In so far as the tribunal had adopted that approach they were entitled to do so; and, it being accepted that the employee knew full well the allegations against him before the letter reached him, the only conclusion was that there had been compliance with step 1.

Draper v Mears Ltd; 5 September 2006; EAT/174/06
EAT: Judge Burke QC, Mr D Evans and Mr J Hougham

STRIKING OUT

A director of a company, who admitted taking money "without consent" from the company safe, was dismissed for gross misconduct. He made a number of complaints to an employment tribunal, including unfair dismissal. At a pre-hearing review the chairman questioned the claimant, considered the pleadings and representations from the parties and struck out, inter alia, the unfair dismissal claim on the ground that, given the claimant's admission, it had no reasonable prospect of success.

UNDERHILL J, allowing an appeal by the claimant, said that there was nothing wrong in principle in a chairman, when holding a pre-hearing review, casting a critical eye over the parties' cases and being prepared to strike out a claim which appeared to have no reasonable prospect of success. Nor was there anything wrong in principle in a chairman asking questions of the parties designed to elicit the real issues and get a better understanding of whether a particular claim had a real prospect of success. But any such exercise needed to be undertaken with caution, particularly where one or both parties were unrepresented; and particularly if there had been no notice, beyond the formal words in the standard letter, alerting the parties to the fact that striking out part of their claim might be on the agenda. Even parties who were represented did not always fully appreciate that what was billed as a pre-hearing review might in fact be an occasion on which they had to address the tribunal on the substantive merits of their claim. That was not necessarily a reason why a chairman should not proceed with a critical examination but he needed to be satisfied that he had, and that the parties had had a proper opportunity to present him with, the documents and submissions necessary to a fair decision. Unfair dismissal claims were of their nature fact-sensitive, though that did not mean that they were never suitable for summary determination, but that it was less likely that they would be. It was submitted, by reference to the decision of Elias J (President) in *Ezsias v North Glamorgan NHS Trust* (unreported) 27 July 2006, that the chairman was not in a position to reach the decision he did, since it was necessary as a matter of law that he should have been satisfied that the reason for the dismissal was the reason he referred to in his judgment, namely the taking of the money from the safe (the burden of proving that that was the reason being on the company), and that it was reasonable for the company to dismiss for that reason. The claimant's claim form made it clear that he regarded all the allegations made against him as in effect a put-up job designed to get him out of the company, and, even if the claimant was guilty of gross misconduct—and his case was that he did not require consent from anybody to remove the money in question—it did not necessarily follow that his dismissal was fair. The chairman's reasons did not address the question of procedural fairness at all, though there was sufficient material before him to put him on notice that there were issues as to the fairness of the procedure which required to be investigated. It was a case which called for more careful investigation than was possible in a summary procedure. Accordingly, the chairman was not entitled to conclude on a summary basis that the claimant had been guilty of gross misconduct justifying summary dismissal and was wrong to strike out the unfair dismissal claim.

Letherbarrow v Kindergarten UK Ltd; 6 October 2006; EAT/258/06
EAT: Underhill J

TIME LIMIT

More than three months after he had been dismissed for gross misconduct, an employee brought a claim of disability discrimination against his employers, concerning the manner in which the disciplinary proceedings had been conducted, alleging that the employers had failed to make reasonable adjustments to reflect the fact of his disability. An employment tribunal chairman decided that the statutory grievance procedure did not apply by reason of regulation 6(5) of the Employment Act 2002 (Dispute Resolution) Regulations 2004, since the employee's grievance was that the employers had dismissed him, and accordingly he could not rely on the three-month extension of the time limit provided by regulation 15; but he went on to find that it would be just and equitable to consider the claim notwithstanding that it was out of time.

JUDGE RICHARDSON, dismissing an appeal by the employers and a cross-appeal by the employee, said that where an employee sought to complain about an employer's actions there would generally be an applicable grievance procedure, and if the employee took the initial step within the normal time limit for presenting his claim, then the time limit was extended by three months under regulation 15. Under regulation 6(5) the grievance procedures did not apply where the grievance was that the employer had dismissed or was contemplating dismissing the employee. The employee submitted that his grievance was not about the fact of the disciplinary proceedings but about the manner in which they were conducted and there was a logical distinction between such a complaint and a complaint about the dismissal or the fact that the employer was contemplating dismissal. The employers submitted that such a complaint was in reality a complaint about the dismissal, and any other interpretation would be unworkable. The provisions of the Employment Act 2002 and the 2004 Regulations should be construed to meet their purpose and objective, but no more widely than was necessary strictly to give effect to the intention of the statute, and regulation 6(5) was intended to avoid duplication between dismissal procedures on the one hand and grievance procedures on the other. It should be construed broadly to avoid undue restrictions on the right of employees to begin proceedings; and a grievance that the employer had dismissed or was contemplating dismissal included a complaint about the manner in which the employer was contemplating dismissal and about the manner in which he dealt with an appeal against dismissal. There was a further layer of complexity if the employee's complaint was not about dismissal but about disciplinary action short of dismissal. Then the grievance procedure was generally disapplied: see regulation 6(6), but in certain circumstances, including a complaint that the disciplinary action was discriminatory or taken for some ulterior purpose, the procedure applied but was treated as complied with if the employee set out the grievance in a written statement sent to the employer within a certain time: regulation 7(1) and (2). There, too, the statutory objective appeared to be to avoid duplication of procedure where the employer was already taking or contemplating disciplinary action, and generally there would be no need for an employee to state a separate grievance. Since the employee's argument on regulation 6(5) was rejected, time was not extended under regulation 15. On the issue of whether it was just and equitable to extend time, the chairman said that he had regard to all five factors in *British Coal Corpn v Keeble* [1997] IRLR 336, and it did not follow when he said that the fourth and fifth factors were inapposite that he left out of consideration any matter he should have considered. He evaluated them under other headings, having particularly in mind the length of, and reasons for, the delay, the extent to which the cogency of the evidence might be affected and prejudice to the employers.

Department for Constitutional Affairs (formerly North Wales Magistrates' Courts Committee) v Jones
EAT: Judge Richardson; 24 November 2006; EAT/333/06

TIME LIMIT

On a claim of race discrimination involving 17 complaints, covering a period beginning some months before the date on which the three-month time limit in section 68 of the Race Relations Act 1976 started, an employment tribunal chairman ruled at a preliminary hearing that 13 were out of time, thereby rejecting the claimant's case that the conduct constituted an act extending over a period, alternatively, that it was just and equitable to consider her complaints. An appeal by the claimant was dismissed by the Employment Appeal Tribunal.

HOOPER LJ, dismissing an appeal by the claimant, said that in *Comr of Police of the Metropolis v Hendricks* [2003] ICR 530, the Court of Appeal set out the test to be applied at a preliminary hearing when the claimant, otherwise out of time, sought to establish that a complaint was part of an act extending over a period. The claimant had to show a prima facie case. The claimant submitted that the employment tribunal had to ask whether the complaints were capable of being part of an act extending over a period. His Lordship saw no meaningful difference between that test and the prima facie test. To resolve the issue it might be advisable for oral evidence to be called: see *Arthur v London Eastern Railway Ltd* [2006] EWCA Civ 1358. The judge below in the appeal tribunal said that, while he had fully in mind that race discrimination claims, when properly made, should be adjudicated, he also had in mind that when a point was properly taken by a respondent as to time a pre-hearing review by the chairman alone was usually the appropriate way of dealing with it. His Lordship agreed subject to the use of the words "usually the appropriate way". While accepting that in practice the issue was usually decided at a preliminary hearing, that "fact" did not help a chairman to decide whether in any particular case the issue should be decided at that stage or later. As to the meaning of the words "an act extending over a period", the claimant submitted that the meaning given to them in *Hendricks* was the correct one and not that given in the later case of *Bexley Community Centre (trading as Leisure Link) v Robertson* [2003] EWCA Civ 576. Since the respondent agreed that the meaning in *Hendricks* was the correct one, there was no need to discuss *Robertson's* case other than to say that it could be read as limiting "an act extending over a period" to such matters as "policy, rule, practice or regime". The claimant submitted that the chairman had wrongly applied *Robertson* rather than *Hendricks*, but his Lordship agreed with the appeal tribunal that the chairman had applied the correct legal test. Accordingly, the claimant had to show that no reasonable tribunal could have reached the conclusion on the facts that the majority of her complaints were out of time. The claimant could not meet that burden, and the chairman had been entitled to reach the conclusions he did.

HUGHES and **THORPE LJJ** agreed.

Lyfar v Brighton and Sussex University Hospitals Trust; 14 November 2006
CA: Thorpe, Hooper and Hughes LJJ; [2006] EWCA Civ 1548

INCAPACITY

In July 2003 an employee made complaints about her transfer to different branch of her employer, but she was dissatisfied with the way matters were dealt with by a manager, and in September went off sick due to work-related stress. Her formal grievance complaints about the manager's conduct were rejected on the, erroneous, basis that they had been fully investigated and were unsupported by the evidence. In June 2004 the employer activated its long term sickness procedure, which resulted in the employee being dismissed on grounds of ill-health in December 2004. Upholding her claim of unfair dismissal, the employment tribunal found that the employee's health condition had been caused by the employer and the way it had dealt with her grievance and that no reasonable employer would have dismissed in the circumstances because no reasonable employer would have found itself in those circumstances but would have investigated the matter properly at an early stage.

UNDERHILL J, allowing an appeal by the employer and dismissing the claim of unfair dismissal, said that it would be overstating the position to say that the fact that an employer had been responsible for the incapacity which was the reason for a dismissal should be ignored in deciding whether it was reasonable to dismiss for that reason. There would be cases where the fact that the employer was in one sense responsible for an employee's incapacity was, as a matter of common sense and fairness, relevant to whether, and if so when, it was reasonable to dismiss for that incapacity. However, the fact that an employer had caused the incapacity in question, however culpably, could not preclude him for ever from effecting a fair dismissal. Accordingly, the tribunal did not err in principle in being prepared to take into account the fact (as it found) that the employer was responsible, and culpably so, for the employee's ill-health; but it was important to focus, not on the question of that responsibility, but on the statutory question of whether it was reasonable for the employer "in the circumstances", which included the employer's responsibility for her illness, to dismiss her for that reason. That question fell to be answered by reference to the situation as it was at the date that the decision was taken. That was not the approach the tribunal took. The focus of its reasoning was wholly on establishing that the manager had behaved badly towards the employee; that the employer had never properly resolved the grievance arising out of that conduct; and that that was the cause of the employee's illness. There was no consideration of what, having reached that regrettable situation, it was reasonable for the employer to do. If, asking the right question, the tribunal could properly have concluded that the employer's decision to dismiss was outside the range of reasonable responses, the right course would be to remit the case, but such a conclusion was not open on the facts. The position in December 2004 was very stark. The medical evidence was unequivocal that the employee was unfit for work and that there was no prospect of recovery. It was not a case where there was something more the employer, having caused the illness, could, and thus should, have done to try and save the employee's employment. There was in truth no alternative to dismissal.

Royal Bank of Scotland plc v McAdie; 29 November 2006; EAT/268/06
EAT: Underhill J, Mr D Evans and Mr M Worthington

SEX DISCRIMINATION

A claim by a member of the armed forces complained of 43 acts of alleged sex discrimination. The employment tribunal upheld the claim in respect of six of the allegations, found that a further nine had been proved but were out of time and dismissed the claim in respect of the remaining allegations.

JUDGE McMULLEN QC, dismissing an appeal by the claimant made in respect of 12 allegations which were found unproved, said that, first, it was submitted that the tribunal failed to recognise the peculiar status of members of the armed services as being fundamentally different from other members of the community for the purpose of enforcing sex discrimination rights. The appeal tribunal had no doubt that the tribunal was fully aware of army life, carrying with it different stresses and considerations, but not so different as to take the armed services outside the ordinary rules relating to sex discrimination. The claimant challenged the tribunal's findings on the 12 complaints appealed on the grounds of perversity. But, taking an overall view of the tribunal's findings and analysing each allegation in context, the claimant had not crossed the high threshold required in *Yeboah v Crofton* [2002] IRLR 634. Then, permission was sought to amend the notice of appeal to contend that the limitation period of three months in the domestic legislation was inconsistent with European Union obligations pursuant to Council Directive 2002/73/EC. It was said that to be consistent with time limits for similar actions of a domestic nature the time limit should be six years, as in tort. The appeal tribunal was not minded to grant permission to raise the point, which could have been taken before the employment tribunal and which would require further facts to be found. However, the appeal tribunal would unhesitatingly find against the claimant. First, the limitation period in respect of the armed forces was extended from the three months for all other claimants to six months by the Armed Forces Act 1996. Secondly, if there was an analogue to the normal law of tort it would be to injury, for which the period was three not six years. Thirdly, the Directive was not prescriptive and the claimant had not made clear how the statement of the European doctrine of equivalence in recital 19 of the Directive set out enforceable rights. Fourthly, the time limits for similar actions of a domestic nature were all three months. The correct analogues were claims under anti-discrimination measures. A three or six month limitation period did not render it impossible for a claimant to seek redress. In any event, that would be a matter to be assessed by an employment tribunal as a matter of fact in the present case. Further, the compatibility of time limits under domestic law relating to sex discrimination in the form of equal pay was conclusively upheld in *Preston v Wolverhampton Healthcare NHS Trust* [2000] ICR 961; [2001] ICR 217, and there was no reason why a different approach should be taken in respect of the six-month limitation period for armed service personnel.

Mates v Ministry of Defence; 27 November 2006; EAT/306/06
EAT: Judge McMullen QC, Mr P Smith and Mrs R Vickers

TIME LIMIT

An employment tribunal's judgment and reasons sent to the parties on 23 March 2006 erroneously contained two case numbers in the heading, one of which referred to a pending application which had not then been heard. On 6 April 2006 a certificate of correction was issued which stated that those reasons were deleted and the attached reasons substituted. Attached was the previous judgment and reasons but with only one case number recorded. On 5 May 2006, a day after the expiry of six weeks from the date of the original judgment, the claimant lodged an appeal. The Registrar of the Employment Appeal Tribunal rejected the appeal as being out of time on the basis that the six-week period for lodging the appeal ran from the date when the judgment was first issued.

BURTON J, allowing an appeal by the claimant, said that in the ordinary course of a correction it would not make time run afresh and the Registrar's decision would ordinarily be correct. There might be circumstances, depending on their own facts, in which a correction was so substantial that it might justify delay, in the sense of a need for further consideration by the appellant. In the present case, though the claimant said he was bewildered by the fact that on the face of it a claim had been dismissed which he had not thought was being dealt with, there was no mention whatever of that claim in the judgment. Once it was appreciated that there was clearly an erroneous reference to the second case number, the obvious course would have been for the tribunal to have made the necessary correction, simply sending a further copy of the first page with the incorrect case number deleted, under cover of a certificate of correction. However, the certificate of correction was in terms which positively deleted the entirety of the reasons and substituted an entirely fresh judgment. That meant there was a complete substitution of a fresh judgment and that time ran from the promulgation of the new reasons, i e the date of the certificate of correction making the substitution. In the event of there being a need for a correction, either as a result of an error being pointed out by a party, or as a result of the tribunal noticing such need, unless the correction was so substantial as to require a fresh decision—in which case it probably constituted not a correction but a review of its own motion under rule 34(5) of the Employment Tribunals Rules of Procedure 2004—the tribunal should not adopt the course of sending out a certificate of correction that purported to delete the entirety of the reasons and to substitute new reasons. The tribunal should simply send out the corrected page under cover of a certificate of correction. It might well be appropriate additionally, for the avoidance of doubt, to accompany that with a statement that the date of promulgation remained unaltered, and the tribunal could add words to the effect that the time for any appeal continued to run from the original date.

Aziz-Mir v Sainsbury's Supermarket plc; 15 December 2006; EAT/537/06
EAT: Burton J (as in chambers)

UNFAIR DISMISSAL

An employment tribunal found that an employee's dismissal was unfair by reason of section 98A of the Employment Rights Act 1996 on the ground that the employers had failed to comply with the statutory disciplinary and dismissal procedures prescribed by Schedule 2 to the Employment Act 2002 because they had suspended the employee without pay both before providing her with a written statement of why they were contemplating dismissing her and before the disciplinary meeting following which she had been dismissed for gross misconduct.

UNDERHILL J, allowing an appeal by the employers, said that it was plain from the tribunal's findings that there was a written statement of the grounds for the action proposed to be taken against the employee, that there was a disciplinary meeting and that there was an appeal. All three steps of the standard procedure in Part 1 of Schedule 2 were, therefore, completed, but the tribunal based its decision on the fact that the employee had been suspended without pay prior to any of those steps having been taken. Counsel for the employers accepted that that was a breach of the procedure, because suspension without pay constituted disciplinary action within the meaning of the Act and it was clear that the statutory procedures did not permit such action to be taken prior to Step 1. But, he argued, that was irrelevant because the relevant question for the purpose of section 98A of the 1996 Act was whether the procedures had been completed "in relation to the dismissal". That seemed to be correct. Section 98A was concerned with unfair dismissal and subsection (1)(a) focused attention specifically on whether the procedures applied "in relation to the dismissal". The fact that there had been a failure in relation to a distinct disciplinary step, namely suspension without pay, ought not to have any bearing on the question of whether the procedure had been completed in relation to the matter complained of, namely dismissal. The provision for automatic unfair dismissal was a strict provision with punitive effect, requiring a literal application. On that basis the straightforward question was whether the employers had completed the statutory procedures in relation to the decision to dismiss and plainly they had. Accordingly, the decision of the tribunal that there was an automatic unfair dismissal could not stand. However, the tribunal did not address the question of whether the procedure adopted by the employers was unfair on an ordinary section 98 basis, and that question should be remitted for the consideration of the tribunal.

A to B Travel Ltd v Kennedy; 11 October 2006; EAT/341/06
EAT: Underhill J, Mr B Beynon and Miss S Wilson

WORKING TIME

On complaints by five bus drivers, under regulation 30 of the Working Time Regulations 1998, in relation to the rest hours permitted to them by their employer, the employment tribunal decided, as a preliminary issue, that, although regulation 21(c)(viii) operated to exclude the drivers' rights under regulation 10(1) to 11 consecutive hours rest in each 24-hour period, they were entitled both to adequate rest, as mobile workers, under regulation 24A and to compensatory rest under regulation 24.

JUDGE PETER CLARK, allowing an appeal by the employer, said that, where the application of regulation 10(1) was excluded by regulation 21 and a worker was accordingly required by his employer to work during a period that would otherwise be a rest period, then solely by virtue of the regulation 21 exclusion the worker might be required to work more than 13 hours in a 24-hour period. That was not the case with mobile workers, who were a sub-set of the group identified at regulation 21(c)(viii). They were additionally excluded from the provision contained in regulation 10(1) but were entitled to adequate rest as defined in regulation 24A(3). Thus they were not simply excluded from the protection of regulation 10(1) by regulation 21. More significantly, they would not otherwise be entitled to the rest period provided for in regulation 10(1) because, instead, they were entitled to adequate rest in lieu of the fixed period provided for in regulation 10(1), from which they were excluded by regulation 24A(1). The contrary argument was that, since the drivers fell within both regulation 21 and 24A, they were entitled to both compensatory rest and adequate rest. The drivers submitted that it could not be right that, if adequate rest under regulation 24A was less than the fixed period provided for in regulation 10(1), they should not be entitled to compensatory rest under regulation 24, since they would be in a potentially less favourable position than the larger group provided for in regulation 21(c)(viii), of which they were also part. Attractive as that submission was, it could not be accepted as a pure matter of construction. It was not the operation of regulation 21 that deprived them of the fixed rest period provided for in regulation 10(1); it was the substitution by regulation 24A of adequate rest as defined for that fixed rest period. Accordingly, there would be substituted for first paragraph of the judgment of the employment tribunal a declaration that the drivers were entitled to adequate rest pursuant to regulation 24A but not to compensatory rest pursuant to regulations 21 and 24.

First Hampshire & Dorset Ltd v Feist; 20 December 2006; EAT/510/06
EAT: Judge Peter Clark, Mr C D Edwards and Mr D G Lewis

DISABILITY DISCRIMINATION

An employee, who was dismissed following a year's sickness absence, made complaints of unfair dismissal and disability discrimination, contending that, although because of her medical condition she was unable to work in her current post, she could have coped with other work and that the employer had failed in particular to notify her of two possible jobs which became available. The employment tribunal concluded that the employer had failed in its duty to make a reasonable adjustment in that it did not consider the employee for employment in an alternative capacity; that that failure was inextricably linked with the decision to dismiss her; and that, given the employer's resources, the employee had therefore also been unfairly dismissed.

JUDGE McMULLEN QC, allowing an appeal by the employer against the finding of disability discrimination, said that, in considering whether there had been a failure to make a reasonable adjustment, a tribunal should go through the stages set out in *Smiths Detection Watford v Berriman* (EAT/712/04) so as to make the correct comparison. In the present case the focus was on the job, but there was no indication of what it was about the job that put the employee, as a person disabled by ME, at a substantial disadvantage. There was no indication as to whom she was to be compared with. She was unable to do work in her existing post on a full or part time basis; therefore, there was nothing that could be done to adjust for her. The duty simply did not arise. The tribunal did not follow the course set out in *Smiths Detection* and therein lay an error. The tribunal also fell into error in failing to follow medical evidence that the employee's condition meant that she was unfit for any work at all, whatever premises or arrangements were involved. As to the finding by the tribunal that the duty existed to *consider* the employee for alternative employment, there had been a divergence of opinion at the Employment Appeal Tribunal as to whether a failure to consider an assessment of what adjustments could be made was a breach of the Disability Discrimination Act 1995. In *Tarbuck v Sainsbury's Supermarkets Ltd* [2006] IRLR 664, para 72, the appeal tribunal said: "whilst it will always be good practice for the employer to consult and it will potentially jeopardise the employer's legal position if he does not do so—because the employer cannot use the lack of knowledge that would have resulted from consultation as a shield to defend a complaint that he has not made reasonable adjustments—there is no separate and distinct duty of this kind." The present case represented the kind of error illustrated in *Tarbuck*. It was not a failure to make a reasonable adjustment to fail to consider whether alternative work was available. The sole basis was a failure to consider, which was equivalent to a failure to consult or to carry out an assessment. It was what was done that was important. If there was a failure to make adjustments when the duty applied, there would be a breach. Failure to assess might put an employer who did not do so at risk, but it was not itself a breach of the duty to make adjustments. It would be good practice and common sense for an employer always to consider an assessment because if he did not do so it was likely he would miss an important avenue and an important possibility of there being an adjustment that could reasonably be made to save the employee's job, or at least adapt it. Turning to unfair dismissal, the appeal tribunal accepted that the employment tribunal had linked the territory of the case as between the two different jurisdictions. But the tribunal addressed the proper test under section 98(4) of the Employment Rights Act 1996 and took account of the employer's large resources. The finding of unfair dismissal was not fatally tainted by the error into which the tribunal fell when it discussed reasonable adjustments. The failure to consult the employee about the two alternative employment opportunities represented a failure under section 98(4) to consider her case correctly.

Barnet London Borough Council v Ferguson; 18 September 2006; EAT/220/06
EAT: Judge McMullen QC, Mr M Clancy and Mr I Ezekiel

DISABILITY DISCRIMINATION

An employee, who suffered from a degenerative knee condition, over time became unable, according to medical reports, to work at her job as a mobile library manager. After efforts to redeploy her failed, she was dismissed. Upholding her complaint of discrimination on the ground that her employer was in breach of sections 5(2) and 6 of the Disability Discrimination Act 1995 by failing to make reasonable adjustments in order to enable the employee to carry on her work as a mobile librarian, the employment tribunal criticised the employer for not having carried out a "formal risk assessment" of the employee's ability to perform her work in the light of her disability. The Employment Appeal Tribunal (EAT/710/05) allowed an appeal by the employer.

BUXTON LJ, dismissing an appeal by the employee, said that the evidence indicated that the employer was under a certain amount of difficulty in responding to what precisely the employee's problem was as she perceived it to be, but the employment tribunal came to the conclusion that adjustments could have been made to her work and that it was not right that she should have been faced with an ultimatum of an offer of alternative work which, when she refused it, caused her dismissal. In appearing to think that a risk assessment was a separate component in the employer's duty under section 5 of the 1995 Act the employment tribunal saw itself as following the Employment Appeal Tribunal decision in *Mid-Staffordshire General Hospitals NHS Trust v Cambridge* [2003] IRLR 566. It was agreed between the parties on the appeal that that reliance had been incorrect and that the law was properly stated in the later appeal tribunal decision in *Tarbuck v Sainsbury's Supermarkets Ltd* [2006] IRLR 664, paras 77–78, which held that the single question under section 5 was whether the employer had complied with his obligations there set out. If he had failed to conduct a proper (not a "formal") assessment then he could not use ignorance by reason of that failure to excuse lack of compliance; but there was no separate and distinct duty to perform that assessment. Counsel had told the court that, despite there being no issue on the point in the present appeal, the industrial relations community would welcome confirmation that *Tarbuck* rather than *Mid-Staffordshire* should be followed in future, but that could not be done through the medium of the present appeal. The employment tribunal was undoubtedly influenced by the view that it had taken about risk assessment but never said, or implied, that the nature of the risk assessment was conclusive and addressed many other matters. But its determination was fatally flawed by its approach to the nature of the employee's disability and the employer's reaction to it. In reply to a letter from the employer, the employee said that she did not want redeployment and intended to return to her position as mobile library manager. She was accordingly dismissed for failing to accept alternative employment, being medically unfit to undertake the full requirements of mobile library manager. The employment tribunal thus had clear evidence that the relief sought by the employee had been impossible on medical grounds and that the employer had acted on medical advice to that effect. What the tribunal should have done was to consider whether the employer's conclusion that the employee had to be redeployed was justified. On the medical evidence there was only one possible answer. It was therefore wrong for the tribunal none the less to demand of the employer that it should take steps to enable the employee to continue in a job for which she was medically unfit. The conclusion had to be that the criticism of the employer was unjustified to the point of perversity.

RIX LJ, agreeing, said that the adjustments which it was suggested that the employer could have made, if they constituted findings against the employer, were perversely and irrationally found. If it had been necessary, his Lordship would have agreed that the role of the need for a formal assessment was so pervasive in the employment tribunal's judgment that the apparent finding that reasonable adjustments ought to have been made could not survive as an independent and separate finding.

MOSES LJ, agreeing, said that he agreed with Rix LJ that the tribunal's failure to identify which adjustments ought to have been made to satisfy the employer's duty under the 1995 Act was attributable to the degree to which its error as to assessment infected its decision as a whole. The tribunal's decision was vitiated by its erroneous approach to the process of assessment.

Surrey County Council v Hay; 16 February 2007; [2007] EWCA Civ 93
CA: Buxton, Rix and Moses LJJ

PRACTICE

An employment tribunal rejected a claimant's claim of unfair dismissal because, although faxed to the tribunal on the prescribed form, as required by rule 1(3) of the Employment Tribunals Rules of Procedure 2004, the form had been reduced in size during the fax transmission. An application for review was refused on the ground that the rejection of the claim was an administrative function and the Rules did not provide for a review.

ELIAS J (PRESIDENT), allowing an appeal by the claimant, said that there were two issues on the appeal: whether the Employment Appeal Tribunal had jurisdiction to hear the appeal at all and whether the employment tribunal erred in law in declining to accept the claim form. The 2004 Rules laid down more extensive requirements that a claim had to satisfy before it could be accepted. In part the changes were intended to reflect the fact that the jurisdiction of the employment tribunal was removed in certain circumstances where the Employment Act 2002 (Dispute Resolution) Regulations 2004 had not been complied with. The general approach when considering the operation of those new rules was to construe them in favour of the claimant. The only situation where a claim form could be rejected without the approval of a chairman was, under rule 3(1), where a claim was required by rule 1(3) to be presented using a prescribed form but the prescribed form had not been used. In that case the duty lay with the Secretary of employment tribunals to explain why a claim had been rejected. The purpose of that was to enable the parties to provide a proper and acceptable form on re-submission. Sometimes, such as where a handwritten application had been made without any reference to any form at all, it would suffice simply to say that the prescribed form had not been used and for the appropriate form to be provided. But in a case such as the present that would be inadequate and provide no assistance to the claimant. Such a response did not in the circumstances constitute a proper "explanation" within the meaning of rule 3(1). There was no need for a detailed explanation; it could be very brief but it had to identify the reason why the form had been rejected in a manner which enabled the claimant to understand what had to be put right in any re-submitted claim. It was submitted that the Secretary was exercising an administrative discretion and therefore no point of law was involved. That was a fundamental misapprehension. The decision might be administrative, but it had still to be exercised in accordance with the law. If the Secretary refused a claim for not being in the prescribed form when it obviously was, there would be a remedy. There could be no doubt therefore that the decision had to be reviewable by some court. The only issue then was whether it should be by way of appeal on a point of law pursuant to section 11 of the Tribunals and Inquiries Act 1992 or whether the Employment Appeal Tribunal had jurisdiction. The claimant submitted that the Secretary acted in error of law and that on any sensible use of language it was a decision of the tribunal that a claim under the relevant statute should not be allowed to proceed and therefore fell within the scope of section 21 of the Employment Tribunals Act 1996. It was a decision, but it was perhaps more difficult to say that a decision of the Secretary was a decision of the tribunal, since by section 4 of the Act the composition of the tribunal was a chairman or a chairman and members. Alternatively, the claimant submitted that there was in any event a question of law arising in the proceedings before the tribunal and jurisdiction was conferred by the alternative limb of section 21. The respondent submitted that there were no proceedings before the tribunal until the claim had been accepted and the tribunal accepted jurisdiction. That was unacceptable: the concept of proceedings should be given a wide construction and extended to the situation where a claim had been lodged even if for some reason it was subsequently rejected. Finally, the respondent submitted that in any event the proper route was a review and not appeal. In the present case an application for review was made and refused. The claimant thereafter sought to challenge the substantive decision rather than the refusal to review, as he was entitled to do. It was plainly a perfectly appropriate course for the substantial merits of the case, which raised a point of some principle, to be heard on appeal. As to whether the claim should have been rejected, where faxing was provided as a legitimate way of lodging a claim and if a reduction in size was a natural or even a frequent result of the faxing process, then any reduction in size had to be deemed to be an acceptable consequence of the process. In any event size was not naturally to be treated as an element of the essential features of the prescribed form. The right of an individual to take proceedings should not be restricted save where he fell foul of restrictions which had been clearly and unambiguously spelt out. That was manifestly not the present case.

Grant v In 2 Focus Sales Development Services Ltd; 30 January 2007; EAT/310/06
EAT: Elias J (President), Mr D Bleiman, and Mr J Hougham

RACE DISCRIMINATION

An applicant, who was rejected for a place on a vacation placement scheme for those wishing to pursue a legal career, organised by the Government Legal Services under the auspices of the Treasury Solicitor's Department, complained to an employment tribunal that he had been discriminated against on the ground of his race, contrary to section 13 of the Race Relations Act 1976. The tribunal found, as a preliminary issue, that the placement scheme was "training" for the purposes of section 13.

BURTON J, dismissing an appeal by the respondent, said that the employment tribunal had found, as an alternative, that, if the placement scheme did not amount to training, then it could be said to amount to "other facilities concerned with such training" within section 13(1), the training in those circumstances being a subsequent government legal training scheme. That was not an argument raised at all during the hearing and appeared to have been an afterthought of the chairman when he came to write the judgment. Plainly it was not a sensible course for points of that kind—even if they were fallback points, particularly where they were intended to shore up the possibility of the main decision being wrong, which meant they had to be of some importance—not to be canvassed in the course of the hearing and yet to feature subsequently in a chairman's judgment. But, irrespective of that, the point was misconceived. It did not even begin to be arguable that taking part in some earlier course, certainly on the present facts, could be said to amount to facilities in connection with some subsequent course, if it was only the latter course which was the training. Section 13(1), as substituted by section 7(2) of the Employment Act 1989, specifically referred to "an individual seeking or undergoing training which would help fit him for any employment". The starting point was section 78(1) of the 1976 Act which defined training as including "any form of education or instruction". Before its amendment section 13 was considered in *Daley v Allied Suppliers Ltd* [1983] ICR 90, which related to a youth opportunities programme, which was a work experience scheme, sponsored by the respondent. Given the limited nature of section 13 at that stage, the respondent was able to say that the section did not apply because the respondent did not fall into any of the categories in subsection (2). Neill J concluded that the applicant would have been covered by "training" in section 13 but could not benefit from the section because of its restrictive scope, and he invited the government to make some order that would delimit its impact. In 1989 the section was amended to make it applicable to all providers of training. The definition in section 78(1) remained unchanged. The appellant submitted that what it referred to as "passive" education was not education and thus not training. But instruction would plainly be training in those circumstances, because it would be active; while assimilation by watching would not, on the appellant's analysis, be instruction, there was no basis on which it need not be, or could not be, education. And where the definition was "any form of education", passive education, if it be education, was included in the definition of training. Looking at the details of the course as described in the brochure and the applicant's application form, it was plain that the vacation placement scheme constituted "any form" of education. There was no principled reason why the 1976 Act should not apply to work experience or work placement. A simple educational visit might fall within a different category, but that was not the present case.

Treasury Solicitor's Department v Chenge; 12 December 2006; EAT/452/06
EAT: Burton J

CONSTRUCTIVE DISMISSAL

An employee raised a grievance with her employers concerning the way in which they had handled her complaint of bullying by fellow employees. An investigation and hearing took place but the grievance was not upheld, and when an appeal failed the employee resigned. An employment tribunal upheld her claim of unfair constructive dismissal, finding that there were a number of serious flaws in the grievance procedure and that, in failing properly to deal with the employee's grievance, the employers were in breach of their implied duty as to trust and confidence.

LADY SMITH, allowing an appeal by the employers, said that the employers submitted that the only issue had been the quality of the investigation into the claimant's grievance, and that deciding on the scope of such an investigation was a matter for the exercise of discretion by the employers. That meant asking whether they had carried out a reasonable and proper investigation, not whether it was flawed in any respect. The employers further argued that the duty to act reasonably in a grievance investigation was no higher than in the case of a disciplinary investigation and that, had the tribunal considered matters in the light of that principle, they could only have concluded that the employers' conduct was not unreasonable. The questions to be asked in a constructive dismissal case appeared to be (1) what was the conduct of the employer that was complained of; and (2) did the employer have reasonable and proper cause for that conduct? If he did have such cause that would be the end of it. If he did not, a third question arose: was the conduct complained of calculated to destroy or seriously damage the employer/employee relationship of trust and confidence? Although in a straightforward case of unfair dismissal questions of reasonableness only arose when considering whether or not the employer acted reasonably in treating the reason he dismissed the employee as a sufficient reason, rather than at the stage of determining whether or not the employee had been dismissed, the point being addressed was the same. It was that of whether, when conducting himself towards his employee in a manner that resulted in the detriment of the employee losing his job, the employer had reasonable and proper cause for his conduct. In either event, the employer evidently had a duty to act reasonably. That required recognition of the fact that employers were afforded a measure of discretion in the conduct of their relationship with their employees, and in particular when deciding how to conduct disciplinary and grievance procedures. That was evident from the reference to "reasonable and proper cause" in the formulation of the implied term and in the statutory requirement to act reasonably, in section 98(4) of the Employment Rights Act 1996, in response to whatever section 98 reason applied. That meant that employers must not act irrationally or perversely in the course of such procedures: they must not take account of irrelevant material; they must not fail to take account of relevant material; they must not take decisions that no reasonable employer would take. In a case involving resignation in the context of a grievance procedure, when asking whether the employer had reasonable and proper cause for his conduct, it was not only appropriate, but necessary, to ask whether the employer's conduct of the grievance procedure was within the band of reasonable responses to the grievance presented by the employee. Just as with the conduct of a disciplinary procedure, the conduct of the grievance procedure had to be considered as a whole: it was not appropriate to see whether each part was reasonably conducted or not. Only if it had been conducted in a manner in which no reasonable employer would have conducted it could it be said that the employer did not have reasonable and proper cause for his conduct. The employment tribunal had erred in their approach, and, had they considered the conduct of the grievance procedure as a whole, they would have been bound to conclude that the employers had reasonable and proper cause for the outcome on which they determined.

Abbey National plc v Fairbrother; 12 January 2007; EAT/84/06
EAT: Lady Smith, Mr K Edmondson and Mr M Worthington

GRIEVANCE PROCEDURE

When an employee wrote to her employer complaining of unlawful sex discrimination in relation to her pay and conditions, the employer wrote offering her a choice between the standard grievance procedure and the modified grievance procedure and she opted for the modified procedure. An employment tribunal chairman subsequently concluded that there was enough information in the employee's letter to inform the employer that the employee had a complaint against it relating to an allegation under the Equal Pay Act 1970 and held that the employee had complied with the modified grievance procedure before presenting her equal pay claim to the tribunal.

JUDGE RICHARDSON, allowing an appeal by the employers, said that the appeal concerned the modified grievance procedure introduced by section 30 of the Employment Act 2002. Where the procedure applied the employee had to set out in writing not only the grievance itself but also "the basis for it": see Schedule 2, paragraph 9. If the employee did not do so he would be barred from presenting a complaint concerning the matter: see section 32(2). The question was how much detail the employee was required to provide. There was a stark difference between the claim as set out by the employee in her letter to the employer and the claim set out in the claim form to the tribunal. The first was a complaint about inequality with daymen who worked with her and was a complaint about rate of pay, for their grade was different. The second was a complaint about other employees of the employer, who were on the same grade, and was principally a claim relating to bonus. The employer submitted that the letter was insufficient to comply with step 1 of the modified procedure, because it did not set out the basis for the grievance. The employer conceded that the letter would suffice for step 1 of the standard procedure, which only required that the grievance be stated, and that the information which the employee subsequently gave was sufficient to set out the basis of a grievance, but submitted that the basis of grievance set out in that information was in substance different to the complaint set out in the claim form; and, therefore, section 32(1) was not complied with. The requirements of the standard procedure, that the grievance should be set out in writing, were minimal, and it was plain that something more was required where the statutory requirement was to set out not only the complaint but also the basis for the complaint, as was required by paragraph 9 in the case of the modified procedure. An employee had to set out in his statement not only the grievance but the essential reasons why he held his grievance, in sufficient detail to enable the employer to respond. The amount of detail the employee would be able to give was likely to depend on the nature of the grievance. While it was true that that approach to the legislation meant that a written grievance might fail for non compliance with paragraph 9 even though, if the same information were in the claim form, it might be accepted subject to an order for additional information or amendment, it should be borne in mind that use of the modified procedure could not be forced on an employee; he or she had to agree to it in writing. Applying those principles to the present case, the starting point was the claim form and then it was necessary to examine the employee's letter to see whether it set out that grievance and gave the basis for it. The letter did not sufficiently set out the basis for the grievance. There was no indication of the type of male colleague in respect of whom the grievance was said to apply. There was no indication of the type of additional payment in respect of which the claim was made. There was no indication of the type of work in comparison with which equal value was claimed. It would be quite impossible for the employer to respond usefully to the letter except (as it did) by asking for further information as to the basis of the complaint being made. The employee's reply to the request for further information did set out the basis for a grievance. However, the claim form subsequently issued did not relate to the basis of grievance then put forward. It was a different grievance altogether. Up to a point, the question whether step 1 of a grievance procedure had been complied with was a question of fact for the tribunal, but the tribunal had to apply the correct test and reach a conclusion which could reasonably be adopted in the light of that test. The chairman did not sufficiently distinguish between the requirements of the standard and modified procedures and did not have the correct test in mind. It was questionable whether there was a need for a legal provision which barred access to the tribunal altogether if an applicable statutory grievance procedure was not followed by the employee. It was arguable that broadly the same practical result could be achieved by placing on tribunals a duty to stay proceedings while statutory procedures were undertaken.

Bradford City Metropolitan District Council v Pratt; 9 January 2007
EAT: Judge Richardson; EAT/391/06

GRIEVANCE PROCEDURE

Following his resignation after a dispute over his commission, an employee lodged an ET1 claim form complaining of breach of contract. An issue arose as to whether the claimant had complied with section 32 of the Employment Act 2002 and given his employer a written statement of grievance. The employee then lodged a second ET1 claiming constructive unfair dismissal, and the tribunal chairman held that as long as the first ET1 had been received by the employer through the office of the tribunal it constituted a written grievance sent to the employer by the employee, for the purpose of the grievance procedure set out in Schedule 2 to the 2002 Act, and that, accordingly, section 32 had been complied with in relation to the second claim.

WILKIE J, allowing an appeal by the employer, said that the employer submitted that within the statutory scheme an ET1 could not constitute a written grievance. The statutory structure was such that it envisaged that a grievance procedure was invoked before litigation was commenced. Furthermore, once the grievance procedure had been invoked by the sending of a written grievance the employee could not immediately thereafter fire off the opening shot in formal litigation before the employer had had 28 days within which to consider the matter and comply with the requirements of the standard or modified procedure by responding either by holding a meeting or responding in writing. The two processes—the litigation process and the pursuit of a grievance—were separate and distinct and called for separate and distinct approaches. The employment tribunal misread the statutory scheme by concluding that a failure on the part of the employee to send a written grievance could be made up by the commencement of litigation formally by the sending of an ET1. The tribunal was wrong to conclude that an ET1 could constitute a written statement of grievance for the purposes of satisfying the pre-conditions set out by section 32 before an employee could present a complaint that the tribunal was obliged to accept. Furthermore, it was difficult to see how an employee could be said to have sent a statement of grievance to the employer when what the employee had done was commence litigation by presenting an ET1 to the tribunal. There could be no question of a contractual relationship between a claimant and the tribunal service whereby it acted as the claimant's agent by sending the ET1 to an employer on behalf of the claimant.

Gibbs (trading as Jarlands Financial Services) v Harris; 27 February 2007
EAT: Wilkie J; EAT/23/07

PRACTICE

An employee raised a grievance with his employers on 7 October 2005. It was not resolved, and on 21 October he resigned. At 7 p m on 3 November he submitted a claim to the employment tribunal, via the internet, asserting that he had been constructively dismissed unfairly. The employers failed to enter a response and were, accordingly, barred under rule 9 of the Employment Tribunals Rules of Procedure 2004 from taking part in the proceedings. A chairman, sitting alone, found that the 28-day period between presentation of a grievance and the claim, prescribed by section 32 of the Employment Act 2002, had elapsed and that the dismissal was unfair.

JUDGE McMULLEN QC, allowing an appeal by the employers, said that the essential issues raised by the appeal were whether the claim had been made in accordance with the statutory regime for the presentation of a grievance, leaving 28 days before the claim, and whether the chairman should have sat alone, the employers having been barred by not presenting a response. The jurisdiction of a chairman to sit alone was regulated by section 4 of the Employment Tribunals Act 1996. The grounds justifying a tribunal sitting alone included proceedings in which the respondent did not contest the case: section 4(3)(g). The employers submitted that the chairman acted outside his jurisdiction in sitting alone because it could not be said that the employers were not resisting, since letters from the employers showed in terms that they wished to defend even though a response had not been put in. However, resisting had to come from the right to resist; and it did not include a situation where a party had been ordered to take no part in the proceedings. True the respondent might stand on the sidelines and complain but none of that was of any relevance. Thus, the contention that the chairman lacked jurisdiction had to fail. The case was one where there was no *legal* resistance. The employers submitted that, in respect of the 28-day period, there was simply an error in calculation: 28 days had not elapsed. For the purposes of employment tribunals, where claims and responses could be submitted via the internet, there was a 24-hour system, so that when a deadline expired on a given date it expired at midnight. In CPR r 2.8 an example was given as to the meaning of time. A period of time expressed as a number of days should be computed as "clear days". Clear days meant that in computing the number of days the day on which the period began and, if the end of the period was defined by reference to an event, the day on which that event occurred, were not included. The application of the Rules put the present claim two days out of time. A grievance was lodged on Friday 7 October 2005 and the claim form was received by the employment tribunal via the internet at 7 p m on Thursday 3 November. As was made clear by the CPR, where what was required was the elapsing of a period of time before an event could occur, the 28 days had to come and go before the action could be taken. That was a matter of jurisdiction, and it was clear that the case could not be heard. The 2004 Rules set up a regime which was very difficult for ordinary workers and employers to understand and was correctly characterised as rebarbative. In the present case they had had a harsh effect on both parties and illustrated the firmness of the rules and the lack of discretion. The point had also been raised, in relation to section 32(6), as to whether a claim had to be accepted if it was apparent on its face that the grievance procedure had been complied with, as in the present case, by ticking a box on the claim form. On its face, that would give the secretary power to accept the claim, but once the matter was before the tribunal it had to be looked at more carefully. A specious assertion could not survive, and if on analysis it proved incorrect, as a matter of arithmetic, the matter could be unpicked.

The Basingstoke Press Ltd v Clarke; 9 January 2007; EAT/375/06
EAT: Judge McMullen QC, Mr D Norman and Mr P A L Parker

TIME LIMIT

An employee, who had been dismissed for redundancy, invoked an internal appeal 87 days after his dismissal, following which he presented a claim of unfair dismissal to an employment tribunal. A tribunal chairman found that he honestly, and not unreasonably, believed, when the time limit expired for making a claim of unfair dismissal, that he was following a disciplinary procedure, within the meaning of regulation 15(2) of the Employment Act 2002 (Dispute Resolution) Regulations 2004, and that the time limit was thereby extended and there was jurisdiction to hear his unfair dismissal claim.

JUDGE McMULLEN QC, dismissing an appeal by the employers, said that the matter had been referred back to the chairman for further reasons by the Employment Appeal Tribunal for an answer to the question whether the claimant's belief that a dismissal procedure was being followed was reasonable, as the chairman's original judgment had stated, in para 18, that the employee held an honest belief that an appeal procedure was being followed and, in para 19, that he believed that he was following an appeal procedure. The chairman replied that it was not unreasonable for the employee to believe that he had initiated the appeal procedure. The question the chairman had first asked herself was whether the employee had a reasonable belief. There was no challenge to the finding that the employee was a sincere witness. When that was put with the further reasons, the chairman had answered the statutory question and held that the employee had reasonable grounds for believing that a dismissal or disciplinary procedure was being followed, which was a matter open to her on hearing the evidence of the employee only. The chairman also decided that the employee was following the statutory procedure. It had to be borne in mind that the central tenet of the claimant's belief was based on the fact that his solicitor told him that if he lodged an internal appeal within the primary time limit for an unfair dismissal claim his claim would be heard. The finding that the employee believed he had been following the statutory procedure because of the advice on the statute given to him by his solicitor was unimpeachable. It was not perverse. There was a general requirement under the Regulations that there should be no unreasonable delay in taking the steps. The employers contended that a delay of almost three months before putting in an internal appeal was not reasonable. Broadly speaking, that would be right, but that was a different question, and so long as the finding was upheld that the employee was proceeding pursuant to the advice given him by his solicitor there was no abuse of the unreasonable delay provision.

Codemasters Software Co Ltd v Wong; 14 December 2006; EAT/639/06
EAT: Judge McMullen QC

IMMIGRATION

The claimant sought judicial review of the defendant's decision to introduce changes to the Immigration Rules, whereby it became far more difficult for foreign post-graduate doctors and dentists to obtain leave to enter or remain for the purposes of post-graduate training, contending that the decision was unlawful by reason of the failure of the government to consult it before making that decision; and that in making the decision the defendant failed to comply with the requirements of section 71 of the Race Relations Act 1976.

STANLEY BURNTON J, granting a declaration of failure by the defendant to comply with his duty under section 71, said that, generally, the claimant complained that, because of the failure to consult, international medical graduates had incurred expense and devoted their time and resources in seeking to obtain a training post in the UK for no purpose. The claimant's case was that the defendant was under a duty to consult the claimant before making the changes. The defendant denied that he was under a duty to consult. The Immigration Rules were the subject of section 3(2) of the Immigration Act 1971 but were not law in the narrow sense; they were rules laid down as to the practice to be followed in the administration of the Nationality, Immigration and Asylum Act 2002. Generally, when the exercise of a power of a Minister was subject to scrutiny by Parliament, it was not for the courts to subject the Minister's decision to the test of reasonableness or otherwise to impugn the substance of the decision. None the less, it had been held that the Immigration Rules might be impugned if they were "manifestly unjust or in any other such extreme fashion unreasonable". The claimant did not seek to challenge the changes on that basis but on procedural grounds. The measures which were the subject of the proceedings had caused and would cause prejudice to the claimant's members. But the obligation to consult could not be based on an allegation that the change was unfair. There were numerous statutes that expressly imposed on an executive authority an obligation to consult before exercising a statutory power, but Parliament had not imposed such an obligation on the defendant in relation to the Immigration Rules. The question, therefore, arose whether, consistently with the principle of the separation of powers, the court could properly impose an obligation to consult where Parliament had not done so. The judgment of Megarry J in *Bates v Lord Hailsham* [1972] 1 WLR 1373 was authority for the proposition that, where delegated legislation was concerned, the court could not impose an obligation to consult where Parliament had refrained from doing so. In the field of administrative law, the nearly 35 years since that judgment was a very long time indeed. It appeared that the judgment had not been expressly followed, but it was not clear that the principle enunciated by Megarry J was not still good law, at least as far as the present case was concerned. On any basis, however, a duty to consult, if not expressly or impliedly imposed by the legislation (and it was not suggested that there was any obligation necessarily implied) had to be based on special circumstances, and one of those circumstances could be an established practice of prior consultation. Simon Brown LJ in *R v Devon County Council, Ex p Baker* [1995] 1 All ER 73 had identified four broad categories of legitimate expectation, and the claimant submitted that its case fell within category 2 and, if necessary, category 4. As it was not suggested that there was any express promise that the claimant would be consulted, the claimants had to identify a practice of consultation sufficiently settled or uniform as to give rise to an expectation, and an obligation that it would continue to be consulted. It was obvious that the acts relied on by the claimant had to be those of or authorised by the government; thus the conduct of the BMA or the GMC referred to in the claimant's evidence was immaterial for that purpose. Evidence from the Department of Health showed that there had not been such a practice. His Lordship's conclusion was that there had been no consistent practice of consultation such as could have created an obligation to consult the claimant before making the changes to the Immigration Rules in April 2006. Further, on the evidence, if there would otherwise have been a duty to consult, it was inapplicable for good administrative reasons. But, if, contrary to the above conclusions, there was a duty to consult the claimant, the duty had not been complied with. The defendant was subject to the duty imposed by section 71(1) of the Race Relations Act 1976. In *Secretary of State for Defence v Elias* [2006] EWCA Civ 1293, Arden LJ said: "It is the clear purpose of section 71 to require public bodies to whom that provision applies to give advance consideration to issues of race discrimination before making any policy decision that may be affected by them." The evidence relied on by the defendant as establishing compliance was short on detail and there was no reference to any informal assessment having been made before the rules change was announced or took place. The evidence did not establish that the duty imposed by section 71 was complied with. Though that ground of challenge succeeded, it did not justify the quashing of the changes to the Rules, and in any event there had been a subsequent race equality impact assessment, the sufficiency of which had not been challenged. In those circumstances there would be a declaration that the Secretary of State for the Home Department failed to comply with his duty under section 71 before deciding to make the changes.

R (BAPIO (British Association of Physicians of Indian Origin) Action Ltd) v Secretary of State for the Home Department

QBD: Stanley Burnton J; 9 February 2007; [2007] EWHC 199 (QB)

PART-TIME WORKER

An employee was employed on two 50% part-time contracts, one non-academic, the other academic-related, which were paid according to different scales. He made a claim under regulation 5 of the Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000, contending that his duties under the two contracts were carried out in combination and that under the non-academic contract he was being paid less than comparable full-time workers carrying out a combination of similar duties. An employment tribunal chairman struck out the claim on the basis that it had no reasonable prospect of success. The Employment Appeal Tribunal dismissed the employee's appeal, holding that his true complaint was not that his part-time work was paid less than comparable full-time work but that for part of his time he was working (inappropriately) on a non-academic contract, and the right of a part-time worker under regulation 5 not to be treated less favourably than a comparable full-time worker only arose if the treatment was on the ground that he was a part-time worker, which was not the ground of the treatment complained.

MAURICE KAY LJ, allowing an appeal by the employee, said that the power of a chairman of an employment tribunal to strike out a claim was prescribed by rule 18 of the Employment Tribunals Rules of Procedure 2004, and rule 18(7) provided that a claim could be struck out on the ground that it had no reasonable prospect of success. A prospect of success was reasonable if it was realistic as opposed to fanciful, and in *Anyanwu v South Bank Student Union* [2001] ICR 391 Lord Steyn and Lord Hope of Craighead emphasised the need to approach the striking out of discrimination cases with particular caution because of their fact-sensitivity. The judge in the appeal tribunal had expressly referred to the words of Lord Steyn and Lord Hope, but nevertheless concluded: "The point here is a hard-edged point of law deriving from facts which are not in dispute or open to interpretation." His Lordship could not agree with that view. What the employment tribunal and, albeit on a slightly different basis, the judge had done was to come to a conclusion on a factual analysis, or a legal analysis founded on a factual assumption, which might not be correct. Its correctness depended on an assessment of the evidence which might not be susceptible to the schematic conclusion reached below. If at the material time the employee had been working say for the first two and a half days of each week under one contract and the second half of the week under the other contract the position would accord with the employer's case. However, that was not the case that the employee sought by evidence to advance. He had clearly put his case on the basis that, for the convenience of the employer, he had been employed under two part-time contracts, although the reality was that he had one full-time job, and that when compared with other full-time employees and on his own account, its content was academic-related. If that factual basis were to be accepted by an employment tribunal, it could not properly be said that the prospect of the claim under the Regulations succeeding was no more than fanciful. While in order to succeed in his claim under regulation 5 the employee would have to establish that he was "a part-time worker" who was treated less favourably than a "full-time worker" and that the less favourable treatment was "on the ground that" he was a part-time worker, it was too simplistic to conclude at the present stage that he was bound to fail. On any basis the facts were unusual, and the case was fact-sensitive and dependent on what a fact-finding tribunal made of the evidence.

TOULSON LJ, agreeing, said that it was at least arguable that where an employee had two part-time contracts with the same employer, performing contractual duties which were in practice so closely related that it would be difficult to say at a given moment whether he was performing his duties under one or the other contract or both, it was necessary in considering the application of the 2000 Regulations to have regard simultaneously to both part-time contracts for the purpose of considering under regulation 5 whether he had been treated less favourably than a comparable full-time worker carrying out all his contractual duties.

SIR ANTHONY CLARKE MR agreed.

Hudson v University of Oxford; 27 February 2007; [2007] EWCA Civ 336
CA: Sir Anthony Clarke MR, Maurice Kay and Toulson LJJ

PRACTICE

An employment tribunal comprising a chairman and two members upheld, inter alia, an employee's claim of unfair dismissal and adjourned the remedies hearing. When one of the members was taken ill, the regional chairman appointed a substitute member without seeking the views of either the employee, who was unrepresented, or the employer's representative. At the remedies hearing the parties were given the opportunity to object to the new composition of the tribunal but no objection was made, and the tribunal awarded compensation.

JUDGE PETER CLARK, rejecting the employer's appeal made on the ground, inter alia, that the remedies hearing was a nullity due to the alteration in the constitution of the tribunal, said that under regulation 9(3) of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004 the parties' consent had to be obtained when an employment tribunal was to sit with the chairman and only one member, and the parties had to be informed whether the single lay member was from the employees' or the employers' panel. On the other hand, regulation 9(4), which provided for the substitution of a chairman or member previously selected, did not require the consent of the parties before the regional chairman appointed a substitute member. The employer relied on observations by the Employment

Appeal Tribunal in *Pedder v Bird* (unreported) 22 November 1994. There a case had gone part heard and at a later hearing one of the members was replaced by another member without consulting the parties. The appeal tribunal, remitting the case to a fresh tribunal for rehearing, added an observation, not necessary for its decision and without hearing argument, that, while it recognised that the then equivalent regulation to regulation 9(4) gave a discretion to make the substitution, it was questionable whether that should be done midway through the proceedings. There were two material distinctions between that case and the present. First, in *Pedder* the issue of liability had not been determined when the substitution took place, whereas in the present case all that remained was doing the maths. Secondly, the chairman had given the parties the opportunity to object to the new composition of the tribunal at the outset of the remedies hearing and neither party objected. The regional chairman had power to appoint a substitute member, provided he did so acting judicially, which he did. In the circumstances he was not obliged to consult the parties and offer a choice as to continuing with a two-person tribunal or a fresh panel or substitution. It would have been possible to continue with the chairman and the one original member subject to the informed consent of both parties, but Parliament had decided that normally cases should be decided by a tribunal consisting of a chairman and one member from each panel. That tripartite model was to be preferred to an unbalanced two-member tribunal, subject to any real injustice to the parties. None had been demonstrated in the present case.

Monfort International plc v McKenzie; 6 February 2007; EAT/155/06
EAT: Judge Peter Clark, Dr S R Corby and Mr B M Warman

WORKING TIME

An employee's contract of employment provided that his services would be required for up to six days each week for a period of 24 weeks including six days of leave. The employer required such leave to be taken on every other Saturday. On a claim by the employee that the employer was thereby failing to meet its obligation in respect of annual leave under regulation 13 of the Working Time Regulations 1998, an employment tribunal decided that the employee was required under his contract to work six days each week including Saturdays and that, although in practice there was no work to do on alternate Saturdays, under regulations 13 and 15 of the Regulations the employer could require him to take leave on any day he was contracted to work including a Saturday.

LADY SMITH, dismissing an appeal by the employee, said that the issue on the appeal was put as being to what extent in a weekly based employment relationship might an employer legitimately make use of Saturdays to meet his statutory obligation to provide annual leave under the 1998 Regulations. It was argued for the employee that every other Saturday he was only required to be at work for the purposes of taking his holiday, and thus those days did not count as leave days at all, since he would not have worked on them. Stress was placed on an apprehension that the tribunal's decision would allow exploitation by the unscrupulous employer who never intended to operate his business on Saturdays, though it was not suggested that the present employer was ill motivated. The solution, it was submitted, was to construe regulation 15(2) in respect of a worker who was employed on a weekly basis so as to provide that an employer might not specify a Saturday or Sunday to be a leave period for the purposes of meeting the leave requirement that arose under regulation 13(1), save when he would have been required to work had it not been a day of leave. The employer submitted that there was in fact no tradition that Saturday was a non working day; suppose the employer had decided to nominate Wednesdays as leave days; the employee's contract was a six day per week contract. The appeal tribunal did not accept that present day working in the United Kingdom involved a norm of non-Saturday working that was of such substance as to make Saturday working exceptional. In many areas of work there was a contractual arrangement whereby on one or more days of the working week, possibly a Saturday, an employee had to be available for work but might not be called on. There could not be any assumption that an employer who made a regulation 15(2) requirement that leave was to be taken on a Saturday was doing so in furtherance of a sham or that such leave was not "real" leave. There was nothing in the Regulations, reading them in conjunction with Directive 93/104/EC, that indicated that it was not open to an employer in a contract such as the present one to stipulate that leave had to be taken in single days on certain Saturdays. The employee was, in the present case, being released, on alternate Saturdays, from his obligation to be available for work.

Sumsion v BBC (Scotland); 20 April 2007; EATS/42/06
EAT(Sc): Lady Smith, Miss J Gaskell and Dr W Spiers

DISABILITY DISCRIMINATION

A complaint of disability discrimination was made against the respondent organisation, which conferred project management qualifications, by a blind person on the ground that when she sat the credential examination the respondent had not taken all reasonable steps by the arrangements it made to prevent her being placed at a substantial disadvantage within the meaning of section 14B(1) of the Disability Discrimination Act 1995. The employment tribunal directed itself on the burden of proof in accordance with section 17A(1C) by asking whether the claimant had proved facts from which it could be inferred that any provision, criterion or practice had placed her at a substantial disadvantage; and, if so, whether the respondent had proved that there was no such provision, criterion or practice, or that the claimant was not at a substantial disadvantage, or that there were no other steps that could have been taken to reduce or eliminate any such disadvantage. The tribunal found that the respondent had failed to make reasonable adjustments and upheld the complaint.

ELIAS J, PRESIDENT, dismissing an appeal by the respondent organisation, said that in the course of the employment tribunal hearing a new adjustment had been identified, and the tribunal concluded that it was an adjustment that ought to have been made. The tribunal found that the respondent had acted unreasonably in adopting an inflexible approach without adequately listening to the claimant. It also found—and it was fundamental to its reasoning—that the new adjustment, or something like it, would have emerged had proper consultation occurred. That was a sufficient basis on its own to justify its conclusion that there had been no reasonable adjustment in the circumstances. It was a good example of a situation where failure to carry out a proper assessment, though not a breach of the duty of reasonable adjustment in its own right, might well result in a respondent failing to make adjustments which it ought reasonably to make. Turning to burden of proof, it was very doubtful whether the burden shifted at all in respect of establishing the provision, criterion or practice, or in demonstrating substantial disadvantage. Those were simply questions of fact for the tribunal to decide after hearing all the evidence, with the onus of proof resting throughout on the claimant. They were not issues where the respondent had information or beliefs within his own knowledge which the claimant could not be expected to prove. To talk of the burden shifting in such cases was confusing and inaccurate. In any event, the effect of the formulation of approach accepted by the tribunal was to place the burden firmly on the respondent at all stages to show that no reasonable adjustment or further adjustment should have been made. The respondent submitted that merely establishing that an arrangement placed a disabled person at a substantial disadvantage did not amount to a sufficient prima facie case to shift the burden on to the respondent to demonstrate that no reasonable adjustment was possible; that unless there was evidence before the tribunal of an adjustment which at least on its face appeared reasonable and would mitigate or eliminate the disadvantage, the burden did not shift; and that, further, a respondent was entitled to know what it was alleged he had unreasonably failed to do. The appeal tribunal agreed. By the time a case was heard before a tribunal, there must be some indication as to what adjustments it was alleged should have been made, though it was right to say that the respondent was in the best position to say whether any apparently reasonable adjustment was in fact reasonable given his own particular circumstances: that was why the burden was reversed once a potentially reasonable adjustment had been identified. The key point in paragraph 4.43 of the Disability Rights Commission Code of Practice: Employment and Occupation was that the claimant must not only establish that the duty had arisen, but that there were facts from which it could reasonably be inferred, absent an explanation, that it had been breached. The claimant did not have to provide a detailed adjustment, but it was necessary for the respondent to understand the broad nature of the adjustment proposed with sufficient detail to enable him to engage with the question of whether it could reasonably be achieved. The proposed adjustment might well not be identified until after the alleged failure to implement it, and in exceptional cases, as in the present case, not even until the tribunal hearing. In certain circumstances it would be appropriate for the matter to be raised by the tribunal itself, particularly if the employee was not represented. While the tribunal did err in its approach to the burden of proof, its overall conclusion could be fully justified, and it was clear that the tribunal would necessarily have reached the same conclusion, had it directed itself properly.

Project Management Institute v Latif; 11 May 2007; EAT/28/07
EAT: Elias J (President), Mr M Clancy and Mr J C Shrigley

DISCIPLINARY PROCEDURE

Shortly before Christmas 2005 employers wrote to an employee informing him that his appeal against his dismissal would be heard on 29 December, but he did not receive the letter, nor an e-mail to the same effect, until after the appeal had been heard in his absence and his dismissal upheld. On the employee's unfair dismissal claim, an employment tribunal found, inter alia, that the timing of the appeal had not been reasonable, contrary to paragraph 13(1) of Schedule 2 to the Employment Act 2002; that the employers had failed to invite the claimant to a further meeting in accordance with regulation 13 of the Employment Act 2002 (Dispute Resolution) Regulations 2004; and that the dismissal was unfair under section 98A(1) of the Employment Rights Act 1996.

UNDERHILL J, dismissing an appeal by the employers, said that it was plainly open to the tribunal to find that the timing of the appeal meeting on 29 December was not reasonable. Even if the letter could have been confidently expected to arrive at the employee's address on 28 December, being the first working day after Christmas, he would have been left barely 24 hours to prepare for the appeal meeting and to take any necessary advice. The position under regulation 13 was more difficult. The language of regulation 13(1) appeared to be primarily aimed at the type of case where the date for the meeting was set but where some supervening event made it impracticable for the employee to attend. The language fitted less well with a case such as the present where the employee had simply not received the notice in time. Nevertheless it must have been intended to cover such a case: although clumsy, it was not impossible to describe it as "impracticable" for an employee to attend a meeting of which he was unaware. However, that was not the end of the difficulties. In a case where an employer had given reasonable notice of the meeting but the letter had failed to reach the employee for some unexpected reason, it made perfectly good sense to say that the reason giving rise to the "impracticability" was "not foreseeable when the meeting was arranged", but that was much harder to say where, as in the present case, the employer had given unreasonably short notice or had employed some evidently unreliable means of communicating the date or time of the meeting to the employee. In such a case it was all too foreseeable that the employee might not receive the notice. It might seem odd that an employer who had acted unreasonably in those circumstances should not fall within the terms of regulation 13(1) and so not come under the continuing duty imposed by regulation 13(2). Why should he be in a better position than an employer who had behaved well? The answer would appear to be that in such a case the employer would be in breach of his duties under paragraph 13 of Schedule 2 to the 2002 Act and thus liable to the consequences prescribed by section 31 of the Act, albeit by another route. For that reason, the present case was not caught by regulation 13(2). That conclusion avoided the further difficulty which would have arisen on the facts of the present case, namely that the employee did not until the commencement of proceedings inform the employers that he had not received the invitation to the appeal meeting of 29 December until that date had passed. It would have been unsatisfactory to have had to treat the employers as being under a duty to call a second meeting in circumstances where they were unaware of the reason why the employee had failed to attend the first meeting.

Sovereign Business Integration plc v Trybus; 15 June 2007; EAT/107/07
EAT: Underhill J, Mr P Gammon and Ms J L P Drake

EMPLOYMENT TRIBUNAL

Notice of hearing of a claimant's claim for unlawful deduction of wages stated that the case would be heard by a full tribunal. When it was in fact listed before a chairman sitting alone, neither party made any objection, and the chairman heard the case and upheld the claim.

JUDGE PETER CLARK, dismissing and appeal by the respondent employers brought, inter alia, on the ground that the tribunal had been improperly constituted, said that the statutory composition of employment tribunals was dealt with in section 4 of the Employment Tribunals Act 1996. While that section had been the subject of close scrutiny, little attention had been paid the Regulations made under the Act. Section 4(1) provided that proceedings before an employment tribunal had to be heard by a chairman and two members. Subsection (2) provided that, subject to subsection (5), the proceedings specified in subsection (3)—which included unlawful deductions claims—should be heard by a chairman alone. The structure of subsection (5) was that cases were to be heard by a full tribunal unless they related to a claim specified in subsection (3), in which case they were to be heard by a chairman alone unless a chairman directed that they should be heard by a full tribunal, after considering the factors mentioned. Regulation 5 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004 dealt with the composition of tribunals. Rule 10(1) of the Rules of Procedure gave a chairman general powers to manage proceedings. That would include the power to direct whether a case was to be heard by a full panel or a chairman alone. The correct procedure, reading section 4 of the Act with the 2004 Regulations and the Rules scheduled thereto, was as followed. (1) The question as to whether a hearing was to be before a chairman alone or a full panel in accordance with section 4 was a matter for judicial, not administrative, decision. (2) In many cases a case management discussion would be held prior to the substantive hearing, and it should be routine for the chairman to inform the parties as to whether, in his opinion, the substantive hearing was to be before a full panel or a chairman alone, inviting submissions as to whether he should exercise his discretion under section 4(5) for the hearing to take place before a full panel. A simple explanation of the respective merits of trial mode should be given to the parties, particularly if unrepresented, and a ruling, with brief reasons, given. (3) Where no case management discussion has been held, a chairman must ensure that the notice of hearing stated whether the hearing was to be before a full panel or chairman alone; if the latter, parties should be expressly invited to make representations as why there should be a full panel, giving reasons, including those factors referred to in section 4(5). (4) In either event a judicial decision would have been made which was susceptible to appeal. Apart from a change in circumstances requiring the chairman to revisit the question of composition, there was no reason why the final hearing should be susceptible to challenge on a point of law, the relevant decision having been taken earlier, either at the case management discussion or in the form of standard directions. Following the approach in *Glidewell v Secretary of State for Trade and Industry* [2007] ICR 264, it was not an error of law for the chairman not to deal with the composition issue in the absence of challenge by either party. In the present case the chairman, when asked for his comments, had stated that had the issue been raised he would not have adjourned the hearing for a full tribunal to be empanelled. The factual inquiry was limited, and the case was entirely suitable for trial by a chairman alone. That assessment could not be regarded as legally perverse.

Sterling Developments (London) Ltd v Pagano; 1 May 2007; EAT/511/06
EAT: Judge Peter Clark, Ms J Bilgan and Mr T Motture

PENSION SCHEME

The Pensions Ombudsman upheld complaints by two former employees concerning decisions by the employer and the trustees of the staff pension scheme to calculate their pension entitlement on retirement without reference to their bonuses, when under the terms of the scheme their earnings for the purpose of calculating such entitlement included their bonuses.

LIGHTMAN J, allowing an appeal by the employer and trustees, said that the first issue, which was not answered by the Ombudsman, was whether the complaints were precluded by compromise agreements entered into between the employer and the complainants in 1999. Those agreements provided that the employee accepted a severance payment and continuing benefits in full and final settlement of all his claims against the company arising out of his employment and the termination of it. That clause could not possibly affect their rights under the pension scheme against the trustees and in particular their rights to pension benefits on retirement. The clause was effective to extinguish claims against the employer, including claims requiring action to be taken by the employer, for example, to supplement the funds of a retirement benefit scheme. But it was not in any ordinary sense effective to extinguish a claim against anyone else even though the claim against that other person might occasion an obligation on the part of the employer to make good the cost of meeting that claim. The second issue was whether the Ombudsman was entitled to reject the case made by the employer and the trustees that pension benefits should be calculated without reference to bonuses by reason of oral agreements reached in 1989 between the employer and the complainants. The alleged oral agreements were to the effect that as part of a package a greater part of directors' existing remuneration should be paid and received in the form of salary and that the smaller part paid in the form of bonuses should not be included as part of their earnings for the purposes of entitlement to benefits. That was supported by clearly credible evidence, and it was common ground that such a contractual arrangement would override provisions of the scheme to the contrary. The position sensibly and properly taken in correspondence with the Ombudsman by the employer and trustees was that, if any question arose of not accepting the written evidence of their witnesses, there should be examination of the witness at an oral hearing. The Ombudsman nevertheless took the surprising decision that without affording any such hearing he should reject that ground of defence. One looked in vain for any explanation. There was a substantial body of evidence in support of the alleged agreement, and the Ombudsman could not properly have held that there was no such agreement, at least without an oral hearing. His decisions accordingly could not stand and he must reconsider whether the complainants had sustained injustice by reason of maladministration and for that purpose reconsider the issue of the existence of the oral agreements. At the same time the Ombudsman should consider whether the complainants were precluded from making their complaints by reason of the application of the doctrine of estoppel by convention, i e that the parties at all time proceeded on the basis that the bonuses were not to be taken into account and that to depart from that agreed course would occasion injustice.

A F Blakemore & Son Ltd v Machin; 2 May 2007
Ch D: Lightman J; [2007] EWHC 963 (Ch)

STRIKING OUT

An employment tribunal decided that a claimant employee's constructive unfair dismissal claim had no reasonable prospect of success and struck out the claim under rule 18(7)(b) of the Employment Tribunals Rules of Procedure 2004 at the close of the claimant's case.

UNDERHILL J, allowing an appeal by the claimant, said that previous authorities had been essentially concerned with the dismissal of a claimant's case on the basis that his evidence had shown no case to answer. The effect of those authorities had been summarised in a judgment of Judge Peter Clark in *Clark v Watford Borough Council* (unreported) 4 May 2000, para 19, which had been approved by Ward LJ in *Logan v Customs and Excise Comrs* [2004] ICR 1. Ward LJ, at para 20 of his judgment, had then given a fairly clear, though strictly obiter, indication, after argument, that the introduction of the 2001 Rules and the change in philosophy they were intended to bring in could not be taken as undermining the very cautious approach to submissions of no case to answer enjoined by the previous case law. The considerations underlying the previous approach remained applicable in the new climate. They included: (a) the fact that even in a case where the burden of proof was on the claimant it might well be legitimate for him to expect to be able to extract useful evidence from the respondent's witnesses. (b) The importance of the claimant feeling that the tribunal has heard the entirety of the story before reaching a conclusion—this might be a matter of perception, but it was important to the appearance of justice. (c) The point made by Mance LJ in *Miller (trading as Waterloo Plant) v Cawley* [2002] EWCA Civ 1100, para 12, and quoted by Ward LJ in *Logan* at para 20. (d) The danger that a half-time strike-out would prove a false economy, both because it took up time which could more profitably have been devoted to hearing the respondent's evidence and because of the risk that it would encourage an appeal. All those remained good points under the post-2001 regime, and their force was, if anything, increased because of the greater availability of other procedures for weeding out hopeless claims before they reached a hearing. The 2004 Rules, which were now the applicable Rules, introduced further changes intended to promote active and effective case management by tribunals, including the discouragement of unmeritorious cases. But the approach set out by Judge Peter Clark, and approved in *Logan*, remained the correct approach for tribunals considering whether to dismiss a case on the basis of no case to answer, or otherwise, at half-time. There would, however, still be some cases where such a submission could properly be entertained and should succeed; and tribunals should be fully prepared to consider such a course provided they were really convinced that it would further the overriding objective notwithstanding the considerations identified above. The issue on the present appeal appeared to be whether the case was reasonably judged by the tribunal to be an exceptional case falling within Judge Peter Clark's category (4), though it was submitted that the foregoing jurisprudence had no reference to the application in the present case, as it was not a submission of no case to answer but an application to strike out under rule 18(7)(b), which was an entirely new power introduced in 2004. No doubt that power was available at any stage of the hearing including at the close of the claimant's case, but the substantive reasons why it was normally a bad idea to dismiss a case at half-time were equally applicable when the power being exercised was to strike out on the basis that there was no reasonable prospect of success. It was sufficient to say that in the present case it could not safely be said that nothing useful or relevant to the claimant's case could have been extracted from the respondent's witnesses, and the matter would be remitted for rehearing.

Wiggan v R N Wooler & Co Ltd; 22 March 2007; EAT/542/06
EAT: Underhill J, Mr P Gammon and Mr P R A Jacques

GRIEVANCE PROCEDURE

An employee who resigned when given a default grade under his employer's capability procedure, alleging it was the last straw, failed to raise a grievance with his employer before making a claim of constructive unfair dismissal. In the response to the claim the employer ticked the relevant box to indicate that no written grievance had been made but did not raise the issue of jurisdiction until later. The employment tribunal ruled that section 32(6)(b) of the Employment Act 2002 required the tribunal to be satisfied of the breach by the respondent raising the issue in the response form in order to avoid prejudice to an unrepresented claimant, and that the employer had not done so. The tribunal also held that the employee was not obliged to raise a grievance, in any event, because under regulation 6(5) of the Employment Act 2002 (Dispute Resolution) Regulations 2004 the grievance procedures did not apply where the grievance was that the employer was dismissing or contemplating dismissing the employee. The tribunal, accordingly, held that it had jurisdiction to hear the employee's claim.

ELIAS J, PRESIDENT, allowing an appeal by the employer, said that neither ground relied on by the tribunal was sustainable. The grievance in a constructive unfair dismissal case was about the conduct that was said to be repudiatory and caused the employee to resign. It was not about the dismissal itself—the acceptance of the repudiation—since that was the result of the employee's own action. In principle, therefore, an employee could allege that the repudiatory breach was the fact that the employer was contemplating dismissal. In so far as *Pinkus v Crime Reduction Initiative* (unreported; EAT/87/07) suggested otherwise, the appeal tribunal disagreed. The employment tribunal appeared to have taken the view that, since the compliance procedure could ultimately lead to dismissal, that was enough to justify the conclusion that dismissal was "contemplated". Taken in isolation there was some force in that. However, "contemplated" had to be construed in context, and it was clearly envisaged that an employer might contemplate dismissal or disciplinary action short of dismissal. The latter arose where action was taken but dismissal was not a possible outcome. The possibility that dismissal could occur further down the line if action short of dismissal did not bring about the desired change was not enough to conclude that dismissal was "contemplated". The first stage of the capability process could not itself lead to dismissal. Failure to meet the standard at that stage would set in train further proceedings, and, once those proceedings were set in motion, dismissal was clearly contemplated. But that did not mean that dismissal was contemplated within the meaning of regulation 6(5). Accordingly, the employment tribunal erred in finding that the employer was contemplating dismissal at the stage when the employee resigned, and regulation 6(5) did not, therefore, come into play. Turning to the alternative ground for the tribunal's decision and the question of whether the employer raised the issue of compliance, the factual material which the employer was requested to provide in the response alerted the tribunal to that issue. The purpose of incorporating a section headed "Action before claim" in the response form was precisely to ensure that the employer had the opportunity to provide that information; the employer was asserting that no written grievance raising the substance of the claim had been lodged and that information was provided in accordance with the Regulations. The tribunal erred in finding that there was no obligation on the employee to raise a grievance and in concluding that the employer had failed to raise the issue of compliance, and it ought not to have heard the case. The result was that the employee was denied his remedy because of the operation of highly technical and abstruse rules.

South Kent College v Hall; 2 July 2007; EAT/87/07
EAT: Elias J (President), Mr T Haywood and Mr P R A Jacques

MIGRANT WORKER

An Austrian national and her German husband lived in Austria with their three children, though the husband worked in Germany as a civil servant. She was refused child-raising allowance by the Bavarian authority on the ground that she was not resident in Germany and did not work there. In the course of her appeal against the refusal, the Federal Social Court referred to the Court of Justice for preliminary ruling the questions: (1) whether a national of a member state who, while maintaining his employment in that state, transferred his residence to another member state and carried on his occupation as a frontier worker could claim the status of migrant worker for the purposes of Regulation No 1612/68; and (2) whether article 7(2) of the Regulation precluded a migrant worker's non-working spouse, who lived in Austria and was a national of that state, from being refused child-raising allowance on the ground that she did not reside in Germany.

THE COURT OF JUSTICE said that the Governments of Germany, the United Kingdom and The Netherlands and the Commission submitted that only the movement of a person to another member state for the purpose of carrying on an occupation should be regarded as an exercise of the right of freedom of movement for workers. That argument had to be considered in the light of *Ritter-Coulais* (Case C-152/03) [2006] ECR I-1711, in which the court observed that any national of a member state, irrespective of his place of residence and his nationality, who had exercised the right to freedom of movement for workers and who had been employed in a member state other than that of residence fell within the scope of article 39 EC. The present case concerned a person who, since the transfer of his residence, resided in one member state and worked in another. That he settled in Austria for reasons not connected with his employment did not justify refusing him the status of migrant worker which he acquired as from the time when, following the transfer of his residence to Austria, he made full use of his right to freedom of movement for workers by going to Germany to carry on an occupation there. Accordingly, the answer to question (1) was that a national of a member state who, while maintaining his employment in that state, had transferred his residence to another member state and had since then carried on his occupation as a frontier worker could claim the status of migrant worker for the purposes of Regulation No 1612/68. The benefit of German child-raising allowance could be extended to the applicant only if that allowance constituted for her husband a "social advantage" within the meaning of article 7(2) of Regulation No 1612/68. A benefit such as German child-raising allowance, which enabled one parent to devote himself or herself to the raising of a young child, by meeting family expenses benefited the family as a whole, whichever parent claimed the allowance. The grant of such an allowance to a worker's spouse was capable of reducing that worker's obligation to contribute to family expenses, and therefore constituted for him or her a "social advantage" within the meaning of article 7(2). Unless objectively justified and proportionate to the aim pursued, a provision of national law had to be regarded as indirectly discriminatory if it was intrinsically liable to affect migrant workers more than national workers and there was a consequent risk that it would place the former at a particular disadvantage. It appeared that, under the German legislation in force at the material time, residence was not regarded as the only connecting link with the member state concerned, and a substantial contribution to the national labour market also constituted a valid factor of integration into the society of that member state. In those circumstances, the allowance at issue could not be refused to a couple such as the applicant and her husband who did not live in Germany, but one of whom worked full-time in that state.

Hartmann v Freistaat Bayern (Case C-212/05); 18 July 2007
ECJ: V Skouris, President; P Jann, CWA Timmermans, A Rosas, K Lenaerts and P Kuris, Presidents of Chambers; R Silva de Lapuerta, K Schiemann (Rapporteur), J Makarczyk, G Arestis, A Borg Barthet, M Ilešic and L Bay Larsen, Judges; LA Geelhoed, Advocate General

POLICE

A police constable who, due to an adverse reaction to CS spray, could not be deployed on "operational duties" claimed that she was "permanently disabled" within the meaning of regulation A12(2) of the Police Pensions Regulations 1987 and was entitled, if retired on account of that disability, to an ill-health award under regulation B3. The Police Medical Appeal Board found that, while the constable was permanently disabled from carrying out the ordinary duties of a member of her police force, she was not permanently disabled within the meaning of regulation A12 because she remained able to perform such duties in another force which did not use CS spray, following *R (Sussex Police Authority) v Beck (Note)* [2006] ICR 570.

UNDERHILL J, granting the constable's uncontested claim for judicial review of the board's decision, said that the key words to be construed were "inability . . . to perform the ordinary duties of *a member of the force*" in regulation A12(2). In the great majority of cases it would make no difference whether the words "the force" were construed as referring to a particular police force or to the police service as a whole. The facts of the present case were one illustration of an exceptional case, and in such a case it seemed more natural to read those words as referring to the particular force in which the officer was serving. The existence of a number of individual forces rather than a single force was not a mere technicality: though arising as a matter of history, it was maintained as a matter of deliberate policy. Against that background, a statutory reference to a "police force" was most naturally read as a reference to a particular police force. That general conclusion was reinforced by consideration of the detailed provisions of the Regulations, and such a conclusion also seemed to be right as a matter of policy. Where a police officer was genuinely disabled from serving in the force to which she belonged, it did not seem fair that she should be disentitled to a pension because she might be fit to serve in another force which might be in an entirely different part of the country and be quite different in character from the force she chose to join. Though reluctant to reach a different conclusion from Keith J in *Beck's* case, particularly where Keith J had had the benefit of adversarial argument, his Lordship had reached a clear view on the matter after being referred to the full range of arguments and provisions. The alternative argument on behalf of the constable had been that there were in fact only a few forces in which CS spray was not routinely used and a decision that she was unable "to perform the ordinary duties of a member of the force" was not precluded, even if *Beck* was correct. His Lordship accepted evidence that 37 out of 43 forces used CS spray. In the circumstances that in the great majority of forces CS spray was routinely employed, working in circumstances where CS spray was liable to be used plainly formed part of the ordinary duties of an officer in the police service, and the board's decision was wrong.

R (Corkindale) v Police Medical Appeal Board; 21 December 2006
QBD: Underhill J; [2006] EWHC 3362 (Admin)

POSTED WORKERS

The Commission of the European Communities sought a declaration from the Court of Justice that, by enacting a law whereby foreign undertakings posting construction workers in Germany were obliged, inter alia, to retain at the building site in Germany the necessary documents, in German, for the monitoring of compliance with legal obligations arising from collective agreements in the construction industry, Germany had failed to fulfil its obligations under article 49 EC concerning the prohibition of restrictions on the freedom to provide services within the Community.

THE COURT OF JUSTICE said that under the provision in question, when an employer established outside Germany employed workers in Germany it was required to retain specific documents, in German for the duration of the posted worker's stay and for at least the duration of the building project, without, however, that obligation running beyond a period of two years, so that the documents could be presented at the building site at the request of the supervisory authorities. The relevant documents were the employment contract, the pay slips and time-sheets and proof of payment of wages. By requiring the relevant documents to be translated into German, the disputed provision constituted a restriction on the freedom to provide services, in that it involved additional administrative and financial burdens on undertakings established in another member state. The requirement, nevertheless, pursued a general-interest objective linked to the social protection of workers in the construction industry and the monitoring of that protection, and the court had already recognised that objective as among the overriding requirements justifying such restrictions on the freedom to provide services. The provision was designed to enable the competent authorities of the host member state to carry out the monitoring, at the building site, necessary to ensure compliance with the national provisions regarding worker protection, in particular those relating to pay and working hours. It followed that the obligation laid down by the German law was justified, and that conclusion could not be called into question by the decision in *Arblade* (Cases C-396 and 397/96) [2001] ICR 434. While the court in that case, at para 76, considered that it was not sufficient, for the purposes of justifying a restriction of freedom to provide services, that the presence of certain documents within the territory of the host member state might make it generally easier for the authorities to perform their supervisory task, that paragraph involved the obligation to make the documents available to the competent authorities even after the employer had ceased to employ workers in that state. That was not so in the present case. Further, the provision in question required translation of only four documents, which were not excessively long and for which standard forms were generally used. Consequently, given that it did not involve a heavy financial or administrative burden for the employer posting workers in Germany, the provision did not go beyond what was necessary to achieve the objective sought, which was social protection, and there were no less restrictive measures which would ensure that that objective was attained.

Commission of the European Communities v Federal Republic of Germany (Case C-490/04); 18 July 2007

ECJ: P Jann, President of the Chamber; R Schintgen, A Tizzano (Rapporteur), M Ilešic and E Levits, Judges; D Ruiz-Jarabo Colomer, Advocate General

PRACTICE

An employee, who contended that she had been dismissed because of her age, presented claims to an employment tribunal of unfair dismissal and age discrimination and for unpaid holiday pay. On the same date she submitted a grievance to her employer. The employment tribunal rejected the claims of age discrimination and for holiday pay on the ground that 28 days had not elapsed from the submission of her grievance, as required by section 32(2) of the Employment Act 2002. After the 28 days had elapsed the employee applied to amend her originating application to include the rejected claims. A tribunal chairman refused to allow her to do so.

JUDGE SEROTA QC, allowing an unopposed appeal by the employee, said that the discrimination claim was not "freestanding" but related to the unfair dismissal claim. There was no obligation to present a grievance in respect of an unfair dismissal claim: see regulation 6(5) of the Employment Act 2002 (Dispute Resolution) Regulations 2004; and, following the reasoning in *Lawrence v Prison Service* [2007] IRLR 468, it was unnecessary for a grievance to be served where the claim was for unfair dismissal, albeit on a discriminatory ground. Had that decision been available to him, doubtless the chairman would have accepted the discrimination claim. The position relating to holiday pay, however, was quite different and required a grievance to be issued 28 days before a claim was presented. In *Hounslow London Borough Council v Miller* (EAT/645/06) a chairman, confronted with the problem of premature applications, adopted a practice of staying the claim pending compliance with the grievance procedures. Elias J held that, once the issue of procedural compliance had arisen in a way envisaged by section 32(6) of the 2002 Act, the tribunal simply had no jurisdiction to hear the claim unless it was presented after compliance with the procedural steps; and that, although it might be unduly formalistic to require a fresh presentation of another claim, that was what Parliament had required. Elias J was plainly right: it would defeat the purpose of the grievance procedures if premature proceedings could be stayed pending compliance. However, rule 3(6) of the Employment Tribunals Rules of Procedure 2004 and regulation 15 of the 2004 Regulations did not in any way preclude amendment at the appropriate time (i e after the relevant requirement had been complied with) of an existing valid claim that had been accepted by an employment tribunal. In *Prakash v Wolverhampton City Council* (EAT/140/06), where a claim of unfair dismissal was presented prior to the claimant's dismissal being overturned on an internal appeal, the Employment Appeal Tribunal decided that the employment tribunal had jurisdiction to allow an amendment determined in accordance with *Skelkent Bus Co Ltd v Moore* [1996] ICR 836. In the present case, there seemed to be no reason why an amendment could not be made to add a claim for holiday pay. The employment tribunal had accepted, as properly presented, claims for unfair dismissal and breach of contract. There was, accordingly, a valid originating application or claim form which could properly serve as a vehicle for amendment. It seemed much more sensible for the existing claim to be amended rather than to have a fresh claim form presented; and that seemed to be in accordance with rule 1(8) of the Rules of Procedure.

Mackay v Hanna (trading as Blakes Newsagents); EAT/181/07
EAT: Judge Serota QC; 20 June 2007

COMPENSATION

An employment tribunal increased an award of compensation for unfair dismissal in accordance with section 31(3) of the Employment Act 2002 by the minimum amount of 10% on the ground that the employers' failure to follow the statutory dismissal procedure was due to their ignorance of the law rather than deliberate disregard.

JUDGE BURKE QC, dismissing a cross-appeal by the claimant employee made on the ground that the employment tribunal had erred in increasing the award by only 10%, said that the structure of section 31(2) and (3) of the Employment Act 2002 gave a tribunal a broad discretion to decide whether to make a reduction or an increase, as appropriate, in the relevant award of 10% or more, up to a maximum of 50%, on the basis of what they regarded as just and equitable in the circumstances of the individual case. A tribunal's decision as to whether the adjustment should or should not be more than the basic 10%, and, if so, by how much more, was not confined by statute beyond the words "if it considers it just and equitable in all the circumstances to do so". Parliament had not specified any particular consideration to which a tribunal had to have regard. Nor was a tribunal's discretion confined by authority. The tribunal had to reach their decision on the facts and on the basis of their assessment, judgment and discretion; and the decision thus reached should not rightly be subject to attack on appeal, as had been regularly held in other areas in which the employment tribunal had the power to decide what was just and equitable. There was a parallel, albeit not exact, between the present jurisdiction and the tribunal's jurisdiction to find whether, in unfair dismissal, the employee had been guilty of contributory fault, in which the tribunal exercised a discretion with which an appellate court should be reluctant to interfere; and there was a further parallel with the tribunal's discretion in considering a *Polkey* issue. In considering whether it was just and equitable to adjust an award beyond the basic 10%, it was open to a tribunal to regard as relevant the culpability of the party who had failed to comply with the required statutory procedural step, and, in assessing culpability, to differentiate between a party who had deliberately flouted statutory requirements and a party who had fallen into default through ignorance of those requirements. An employer who was unaware of the requirements would not escape the consequences of his ignorance; the dismissal would be held to have been automatically unfair, and, unless he could bring himself within section 31(4), he would have to suffer an increase of at least 10% in the award to the employee. While the general principle was that employers should inform themselves of the relevant law, it would be wrong in principle to lay down a rule that no distinction could ever be made between an employer who erred out of ignorance and an employer who decided not to comply with the requirements of the law of which he was fully aware. The tribunal had been in no doubt about the nature and scale of the employers' failures to comply with the statutory procedures, and they found that ignorance of the law was not the only factor which had affected what had occurred. It was also a case of muddle and confusion; and it was open to the tribunal to take that into account. The view the tribunal took of culpability was a matter for them. The comparative newness of the requirements of the statutory procedures to be followed was also potentially relevant. There may have been no express evidence as to why the employers were ignorant of those procedures; but the tribunal would, no doubt, by the time they made their decision in the present case, have had to consider other cases in which the statutory procedures had been raised and would, on the basis of their own experience, have been in a position to judge the extent or otherwise to which the newness of the statutory requirements, which came into effect only in October 2004, had been seen to be affecting employers and employees alike. The decision they reached was one which was open to them on material before them.

Cex Ltd v Lewis; 10 August 2007; EAT/13/07
EAT: Judge Burke QC, Mrs C Baelz and Mr R Lyons

EVIDENCE

An employment tribunal found that a claimant had been unfairly dismissed, but that his basic award should be reduced by 25%, and that the compensatory award also should be reduced by 25% for contributory fault, and at the subsequent remedy hearing his compensation was so reduced. The main reason for dismissing the claimant was that his employer suspected that he was planning to leave and work in opposition to the employer, and at the hearing the employer produced a letter from a witness to the effect that she had been approached by the claimant who told her that he was branching out on his own.

BURTON J, dismissing an appeal by the employer against the award, said that the tribunal made an award which ignored any question of the impact of a prior decision to leave, and assumed that the claimant had simply taken reasonable steps to mitigate after the termination of his employment. As a result of inquiries by the employer after the remedy hearing, by way of support for his appeal, he had witness statements from four people, and if that evidence had been given and had been believed, plainly, there would have been a 100% *Polkey* finding at the liability hearing and/or, in any event, no loss at the remedy hearing. The courts set their face against second bites of the cherry. It was in the interests of the public that justice be seen to be done only once, and that so far as possible all evidence be brought forward on the one occasion, always subject to the statutory procedures for reviews and appeals, but not at rehearings. Rehearings would only take place where the missing evidence said to make a difference complied with the well established principle in *Ladd v Marshall* [1954] 1 WLR 1489. There were three tests for fresh evidence to surmount. The first was whether it was credible, and plainly, where there were four signed witness statements, two of which only corroborated and expanded on a letter written four days after the original incident, and where the claimant himself accepted that at least the incident had occurred, albeit that he put a different spin on the conversation, the evidence was plainly credible. As to whether it was material, it was plain that, if believed, it would have had a very dramatic effect on the result. But the third hurdle was whether the evidence was reasonably available at the first hearing, whether it could have been made available by the taking of reasonable steps, and the appeal tribunal were entirely satisfied that the new evidence could have been made available by the taking of reasonable steps. The employer had engaged a firm of employment consultants up to a week or so prior to the liability hearing, but represented himself at the tribunal. They ought to have advised him to take steps to find out whether anyone else might have any information about the planned activities of the claimant, at the very least the employer's own employees. After the liability hearing the employer had no advisers, but should not be regarded as in any way thereby entitled to act incompetently or non-diligently. The fact was that he did not approach any of his employees or subcontractors, and more important, his employment consultants did not do so either. The employer said that the evidence could not have been obtained in time for the remedies hearing with reasonable diligence because up until after the remedies hearing he did not know of its existence. That of course begged the question. It was not suggested that he had the knowledge but kept it from the tribunal; it was accepted that he did not know. The question was whether by reasonable diligence it could have been found out, and clearly it could. In those circumstances, the employer did not come close to satisfying the third hurdle, which was perhaps the most fundamental, in *Ladd v Marshall*.

Todd (trading as Hygia Professional Training) v Cutter; EAT/63/07
EAT: Burton J, Sir Alistair Graham and Ms K Bilgan; 13 July 2007

RACE DISCRIMINATION

An employment tribunal upheld claims of indirect discrimination and victimisation, contrary to section 1(1)(b) and section 2 of the Race Relations Act 1976, against the BMA by a doctor who complained of its failure to support him in his claims against regulatory medical bodies responsible for decisions affecting his postgraduate medical training. An appeal by the BMA was dismissed by the Employment Appeal Tribunal.

LORD JUSTICE MUMMERY, giving the judgment of the court when allowing an appeal by the BMA, said that the BMA's failure to support the claimant's claims was not on the ground of his race; nor was it the result of the application to him of a discriminatory requirement or condition. The crucial point was that his allegations of race discrimination against the regulatory bodies were not well founded in fact or law. On a proper understanding of the evidence and the correct application of the law, that fact, rather than any treatment tainted by race discrimination, was the explanation for the impugned decisions of the BMA. At the end of nine years of litigation the claimant had failed in two sets of employment tribunal proceedings and proceedings in the Specialist Training Authority for race discrimination and victimisation and a judicial review application against the Specialist Training Authority. He succeeded in his present claim in consequence of the BMA's failure to support him in the claims of race discrimination and victimisation against others, which in the event had all failed. The tribunal never got to grips with the issues and never analysed the evidence to see whether the BMA's explanation for refusing support was valid and reasonable. It did not ask or answer the crucial question: did the claimant have a case on race discrimination (against any of the proposed respondents) that was worthy of support? Without such analysis the tribunal was not in a position to draw the inference that the BMA's collective mind was subconsciously closed to the possibility of bringing a race discrimination against the medical authorities. Each refusal decision had to be considered separately; it was not sufficient to look at the reasons globally, as the tribunal did. When the evidence was analysed, the tribunal's essential findings of fact on indirect discrimination were seen to have been without foundation and therefore perverse. The employment tribunal erred in law in its finding of victimisation. Following a letter from the claimant's solicitors, the BMA was in the position of a potential respondent to a claim by the claimant for race discrimination. The BMA's refusal to reconsider its decision might well have amounted to different treatment of the claimant, as the tribunal found, but that did not mean that it was an act of victimisation. The tribunal did not consider *West Yorkshire Police v Khan* [2001] ICR 1064. If it had done so, it would have had to apply Lord Nicholls's words, at para 31, to the facts before it. The only conclusion it could have come to was that it was honest and reasonable for the BMA to seek to preserve its position in the litigation threatened by the claimant. Therefore, the employment tribunal would have been driven to the conclusion that the BMA had not refused reconsideration because of the accusation but in order to protect its position. There had been no victimisation. The speeches in *Derbyshire v St Helens Borough Council* [2007] ICR 841 clarified the interpretation and application of section 4 of the Sex Discrimination Act 1975, which was in similar terms to section 2 of the 1976 Act, so as to put beyond question the correctness of the BMA's original submission that the tribunal erred in law in its finding of victimisation. It was true that the House of Lords did not support Lord Nicholls's formulation of the test as whether the employer had acted honestly and reasonably. However, it reaffirmed the essential statement of law that a person did not discriminate if he took the impugned decision in order to protect himself in litigation.

British Medical Association v Chaudhary; 27 July 2007
CA: Mummery, Smith and Maurice Kay LJJ; [2007] EWCA Civ 788

REDUNDANCY

Having advised the claimant union that it was proposing to make no more than 19 employees redundant at its Leeds site, the employer decided to dismiss 17 employees selected by assessment and three employees who had responded to the employer's request for redundancy volunteers. An employment tribunal found that the employer proposed to dismiss as redundant 20 employees at Leeds, that it failed to comply with the consultation requirements of section 188 of the Trade Union and Labour Relations Consolidation Act 1992 and made an award protecting the remuneration of those employees who were dismissed as redundant for a period of 30 days.

WILKIE J, dismissing an appeal by the employer, said that the sole issue in the appeal was whether the employment tribunal was correct when it decided that the three volunteers for redundancy were to be included within the number of employees whom the employer proposed to dismiss by reason of redundancy so that the number thus proposed was 20 thereby triggering the statutory consultation regime. The first ground of appeal was that the tribunal erred in law by having regard to a policy consideration, namely that to find other than that there had been a dismissal would potentially prejudice future attempts to mitigate the impact of redundancies because it might deter other people from volunteering for fear of losing their entitlements to a statutory redundancy payment. It might have been better for the tribunal not to have strayed into areas of policy but to have limited itself to its statutory function. None the less, it was not a part of its process of reasoning. The second ground was that the tribunal wrongly failed to take into account the realities of the facts. The employer relied principally on *Sheffield v Oxford Controls Co Ltd* [1979] ICR 396 as establishing that the test is one of causation. It submitted that the tribunal failed, in considering causation, to take into account the subjective reasons of one of the volunteers in applying for voluntary redundancy, namely the death of his father and his diagnosis of diabetes. It was said that there was no risk nor any pressure on him to volunteer for redundancy and that, in its absence, the tribunal erred in law in concluding that he had been dismissed. The employment tribunal addressed itself to the question of causation and correctly analysed what was going on when the three volunteers put themselves forward for redundancy. Statements by the tribunal that the issue was not whether the volunteers would have been selected and that it was neither here nor there that they could have withdrawn their applications, did not amount to ignoring relevant factors but simply reflected the fact that the tribunal was focusing correctly on the real issue in the case. What was the cause of the termination of their employment? If it was that they volunteered to be made redundant, what was it that the volunteers were volunteering for? Was it to be dismissed as part of the redundancy exercise or was it, in some way, separate from that exercise, their agreeing to a consensual termination of their employment which might have a knock on effect on the redundancy exercise? The employment tribunal, in concluding that they had volunteered to be dismissed as part of the redundancy exercise, did not err in law.

Optare Group Ltd v Transport and General Workers' Union; EAT/143/07
EAT: Wilkie J, Dr S R Corby and Mr A E R Manners; 10 July 2007

WAGES

Following his employer's response to his claim in the employment tribunal for unpaid salary, a claimant employee wrote a letter to the tribunal disputing the employer's calculation of the sum owing to him on the ground that the employer had wrongly based the daily rate of pay on a 365-day calendar year rather than on the number of days actually worked in a year. The claimant did not attend the hearing and a tribunal chairman dismissed his claim without apparently considering his letter.

JUDGE PETER CLARK, allowing an appeal by the claimant, said that where a party failed to attend a hearing the position was governed by rule 27 of the Employment Tribunals Rules of Procedure 2004. Rule 27(5) permitted the tribunal to dismiss or dispose of the proceeding or to adjourn the hearing. It was clear from the wording of rule 27(6), however, that before dismissing an absent party's claim the tribunal had to consider any information made available by the parties. The information made available by the parties included the respondent's ET3 and also the claimant's letter, which complied with the requirement for written representations set out in rule 14(5). The judgment and reasons of the chairman recorded "no written submissions"; that indicated that the claimant's letter was not taken into account. Also there was no indication that the chairman had considered the ET3, else he would have noticed that the claim was to an extent admitted and, on the face of the response, the claimant was entitled to that sum. The chairman dismissed the claim on the basis that the claimant was not present to prosecute the claim or to adduce evidence or documents, but the principal issue between the parties was the calculation of the daily rate of pay, which was not one of fact, but of law. The chairman fell into error by failing to consider the information provided by the parties before dismissing the claim. In *Thames Water Utilities v Reynolds* [1996] IRLR 186, a case decided before the introduction of the Working Time Regulations 1998, the Employment Appeal Tribunal held that section 2 of the Apportionment Act 1870 applied when calculating a day's pay for the purpose outstanding holiday pay and that the calculation should be based on calendar year, not a working year. Following the introduction of the 1998 Regulations, the point arose again before the Employment Appeal Tribunal in *Leisure Leagues UK Ltd v Maconnachie* [2002] IRLR 600; [2002] ICR Recent Points Part 5, when it considered *Reynolds* but held that accrued holiday pay entitlement should be calculated by reference to the number of working days in the year. In the interest of comity it was the practice of the Employment Appeal Tribunal to follow the more recent case where there was an earlier inconsistent decision, which had been considered, unless the later case was plainly wrong. Further, accepting the reasoning in *Maconnachie* by reference in particular to the advent of the Working time Regulations, the modern approach to outstanding holiday pay but also to outstanding ordinary pay ought to be the same and ought to be consistent with the approach found in the recent employment provisions as opposed to the Victorian Apportionment Act. Accordingly, the point of principle would be resolved in favour of the claimant.

Yarrow v Edwards Chartered Accountants; EAT/116/07
EAT: Judge Peter Clark; 8 June 2007

[2007] ICR Part 12

COMPENSATION

An employment tribunal upheld a claim of constructive unfair dismissal by an employee who had resigned and very shortly afterwards found employment at an equivalent salary. The tribunal made a basic award of compensation, plus £250 for loss of statutory rights, even though he had been in his new employment for over a year. The tribunal also made an award of costs against the employee on the ground that he had been unreasonable in persisting in a claim for re-engagement and rejecting a £1,000 settlement offer.

WILKIE J, dismissing an appeal by the employee and a cross-appeal by the employers, said that, while accepting that the employee had acted in good faith throughout, in the sense that he had honestly been pursuing the remedy he had sought from the outset, he was not entitled, merely because he had claimed re-engagement as the remedy for unfair dismissal and succeeded in obtaining a finding of unfair dismissal, to pursue a remedy of re-engagement long after it had become blindingly obvious that no such remedy was remotely practicable. Furthermore, again accepting his good faith, it had been spelt out to him on two occasions why it was that his entitlement to a basic award was limited to 12 months. In those circumstances, one could understand why the employment tribunal concluded that, by insisting on pursuing those twin tracks, the employee conducted the litigation unreasonably, entitling them to exercise their discretion in awarding costs. On the cross-appeal, the employer argued that, because the employee had remained in his new employment for a year, he had accrued certain statutory protection against unfair dismissal and that loss of protection had, therefore, ceased to be a head of actual demonstrable loss to him; that, on the contrary, he had suffered no loss at all. It was said that, properly analysed, the head of award for loss of statutory rights was in respect of a contingent loss for the risk that the employee who had been unfairly dismissed ran from his dismissal until such time as he succeeded in obtaining further employment and retaining it for a sufficient period to accrue protection from unfair dismissal. The reason it was always a conventional sum reflected the fact that it was very difficult, if not impossible, to carry out any form of proper assessment of what that risk might amount to. Therefore, it was said, where it was known with certainty that the employee had found employment and retained it so as to secure statutory protection and not in the meantime been dismissed, he had not suffered any loss. That was too simplistic a view. First, the compensatory award was to be such sum as the tribunal considered just and equitable in all the circumstances. The tribunal had to have regard to the loss sustained by the employee but was not limited to what could be demonstrated to be financial loss. The conventional award of a relatively modest sum in respect of that head of compensation rather reflected the fact that it was not necessarily the result of any precise arithmetical calculation. Secondly, the mere fact that the employee had retained his new employment for a period of 12 months, and so had restored his statutory protection, did not necessarily mean that he had suffered no loss in the meantime. There was the fact that he had been under the shadow of being dismissed without statutory protection for a 12-month period. In addition, the amount of statutory protection in terms of the calculation of the basic award was very much a reflection of the period of time spent in the employment from which the employee had been unfairly dismissed. Accordingly, there would always be a deficit in relation to the calculation of the basic award which would accrue in the event of a subsequent unfair dismissal from a subsequent period of employment, and therefore there was no reason why conceptually and in accordance with section 123 of the Employment Rights Act 1996, the tribunal erred in law in making the conventional award of £250 compensation in respect of loss of statutory rights.

Wolff v Kingston upon Hull City Council; 7 June 2007; EAT/631/06
EAT: Wilkie J, Mr M Clancy and Mr S Yeboah

STATUTORY PROCEDURE

Employees dismissed on 5 March 2005 appealed against the decision on 8 March. The appeals were heard by the employer on 4 July 2005 and rejected by him by letter four days later. An employment tribunal found, inter alia, that the dismissals were not automatically unfair under section 98A of the Employment Rights Act 1996, since the statutory dismissal and disciplinary procedure had been complied with, notwithstanding the delay between the lodging of the appeals and the employer's appeal meeting.

JUDGE PETER CLARK, allowing an appeal by the claimant employees, said that the issue on the appeal was whether the dismissal and disciplinary procedure was "completed", for the purposes of section 98A(1)(b) of the 1996 Act, where the employer had failed to comply with one of the requirements of the procedure. The failure on which the claimants relied was the general requirement in paragraph 12, in Part 3 of Schedule 2 to the Employment Act 2002, that each step and action under the procedure had to be taken without unreasonable delay. The particular step questioned was the "Step 3: appeal" in Schedule 2, paragraph 3: once the employee had informed his employer that he wished to appeal, the employer had to invite him to attend a further (appeal) meeting. The claimants said that the delay between them notifying the employer that they wished to appeal and the appeal meeting being held was unreasonable, in breach of paragraph 12; and that meant that the procedure was not completed. In *Khan v Home Office* (unreported) 17 November 2006 a three-month delay in complying with step 3 was held, by the Employment Appeal Tribunal, to be unreasonable and the dismissals consequently unfair. In *Patel v Leicester City Council* (unreported) 20 December 2006 the Employment Appeal Tribunal rejected a submission that despite a six-month delay the procedure had been "completed" within the meaning of section 98A(1)(b). In *Sovereign Business Integration plc v Trybus* [2007] ICR Part 8, Recent Points, the Employment Appeal Tribunal held that an employment tribunal was entitled to find employers in breach of paragraph 13 of Schedule 2, which required the timing and location of the meeting to be reasonable, where an employee did not see the notification of the appeal meeting before it was held and failed to attend. It followed that the weight of authority favoured the claimants' case. While not strictly bound by earlier appeal tribunal authorities, in the interests of comity the appeal tribunal followed earlier decisions unless they appeared manifestly incorrect. It was argued that non-completion and non-compliance in the context of section 98A(1) were distinct concepts: to complete meant to finish. Thus, it was argued, in *Trybus* step 3 was not completed, whereas in *Khan* and *Patel* and in the present case step 3 was completed. All five stages were completed; had they not been the non-completion would have been due to the employer's non-compliance and would thus have rendered the dismissals unfair under section 98A. Attention was drawn to the interpretation of "non-completion" in regulation 2(1) of the Employment Act 2002 (Dispute Resolution) Regulations 2004, but it was abundantly clear that that was not a comprehensive definition. Comparison was also made between section 31(3) of the 2002 Act and section 98A. The present factual matrix was that the claimants presented their employment tribunal claims on 3 June 2005; their internal appeals had not then been determined, so step 3 had not been completed. Had the employer's delay been determined unreasonable at that point, the dismissals would have been automatically unfair under section 98A and would have attracted an uplift. The appeal tribunal was not persuaded to depart from the earlier decisions. They all proceeded on the basis that a failure to comply with the requirements of the statutory procedure precluded completion of that procedure. It followed that the claimants' appeal, against the finding that they were not automatically unfairly dismissed because the statutory procedure had been completed, would be allowed. The question of the reasonableness or otherwise of the delay in holding the internal appeal would be remitted to the same tribunal for determination.

Wilmot v Selvarajan; 12 October 2007; EAT/427/06
EAT: Judge Peter Clark, Ms J L P Drake and Mr J Mallender

TIME LIMIT

After an employee had been dismissed, his solicitor sent a grievance letter to his employers alleging unlawful deduction of wages. The grievance was rejected, and the employee made a claim in the employment tribunal for damages for breach of contract. The tribunal dismissed the claim, which was made after the expiry of the three-month period for bringing a claim provided by article 7 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994, as out of time, holding that the extension of time provision in regulation 15 of the Employment Act 2002 (Dispute Resolution) Regulations 2004 did not apply to a claim for breach of contract.

JUDGE PETER CLARK, allowing by consent an appeal by the employee, said that the statutory grievance procedure applied to a claim brought under the 1994 Order in certain circumstances, so that, on the present facts, the grievance lodged by the employee within the primary limitation period, complying, as it did, with step 1 of the modified grievance procedure in paragraph 9 of Schedule 2 to the Employment Act 2002, had the effect of extending the primary limitation period by three months, by virtue of regulation 15(1)(b), read with regulation 15(3)(b), so that the claim was in time. The employee had not argued that the dismissal and disciplinary procedure applied to his breach of contract claim, but that the statutory grievance procedure did. Though section 31 and section 32 of the 2002 Act related to different matters, neither was relevant to the limitation extension under regulation 15. Specifically, section 32 was concerned with a failure to comply with the statutory grievance procedure, depriving the tribunal of jurisdiction in certain circumstances. That bar, however, applied only to jurisdictions listed in Schedule 4 to the Act, not to those in only listed in Schedule 3 (breach of contract). A failure to comply with the statutory grievance procedure, therefore, barred a claim of constructive unfair dismissal, though not a claim of actual unfair dismissal, which was covered by the dismissal and disciplinary procedure. Regulation 6(1) (application of the grievance procedures) referred to claims under Schedule 3 or Schedule 4; either would do. Although a claim for breach of contract under the 1994 Order could only arise after termination of employment, in the present case the grievance was not about dismissal (compare regulation 6(5)), but about the employers' failure to pay bonuses and expenses, so that the statutory grievance procedure was not disapplied by virtue of regulation 6(5). It would be otherwise if the claim for breach of contract was a common law claim for wrongful dismissal. In those circumstances, the statutory grievance procedure would be disapplied by regulation 6(5) and the claimant could not rely on regulation 15. That interpretation was further supported by the insertion of article 7(ba) into the 1994 Order at the same time as the 2004 Regulations came into force.

Mowels v Vox Displays Ltd; 24 July 2007; EAT/122/07
EAT: Judge Peter Clark

WAGES

An employee whose employment commenced in 1990, and who was promoted in 1996, on each occasion produced his City and Guilds trade qualification certificates, which were a requisite for his employment. His duties included that he should contribute to an out-of-hours manager emergency on-call system, for which he received a daily allowance for being on call when rostered for such duties, together with overtime payments if called out. When in February 2004 the employee failed to reproduce the certificates in response to a request for his current trade qualifications, he was taken off the on-call roster. He estimated that obtaining copy certificates would cost £2,000 and take more than a year and asked for an advance of £1,000. When asked why it would cost so much he replied: "No comment." An employment tribunal upheld a claim by the employee that his employer had made unauthorised deduction of wages contrary to section 13 of the Employment Act 1996, accepting that he had genuine difficulties obtaining his certificates. The Employment Appeal Tribunal allowed an appeal by the employer.

SIR PETER GIBSON, dismissing an appeal by the claimant, said that the correct starting point was to consider what wages were properly payable to the claimant within section 13(3) of the Employment Rights Act 1996, and that required consideration of all the relevant terms of his contract of employment. That, however, also required consideration of any implied terms, and the employment tribunal at that stage had wrongly ignored the implied term and fact that such terms entitled and indeed required the employer to remove the claimant from the on-call roster. Without proper analysis of the contract the employment tribunal found that the amounts properly payable would include the amounts he would have earned by being on the roster. It did not consider the specific Whitley Council terms, incorporated into his contract, which governed payment. He was not entitled to be paid in respect of his obligation to contribute to the on-call system except when he was on the roster. That accorded with the Whitley Council terms. Those payments were entirely separate from the ordinary salary to which the employee was contractually entitled. In the present case the employment tribunal found that the employer was entitled and bound, on health and safety grounds, to remove the claimant from the on-call roster pending clarification of his qualifications. The claimant's contract of employment expressly imposed on him the obligation to contribute to the on-call system but was silent as to any obligation on the employer to maintain a technician on the on-call roster. Having regard to that and the similarity with the position in law in regard to overtime an employee was required by his contract to work and the absence of any obligation on the employer to provide overtime, his Lordship was not persuaded that there was any obligation on the claimant's employer to maintain him on the on-call roster. If that was wrong, any such obligation could be overridden by the implied term which, as the employment tribunal found, authorised the employer to remove the claimant from the roster pending clarification of his qualifications. That disposed of the appeal, but it was appropriate to comment on what was said to be the legal principle emerging from *Albion Hotel (Freshwater) Ltd v Silva* [2002] ICR Part 1, Recent Points. The Employment Appeal Tribunal's remarks in that case had been qualified by the Court of Appeal in *Stanley Cole (Wainfleet) Ltd v Sheridan* [2003] ICR 1449. In short, it was not in every case that an error of law occurred when an employment tribunal failed to give parties the opportunity to comment on an authority relied on by the employment tribunal. Substantial unfairness or material injustice had to be seen to have resulted if an appeal was to be allowed on that ground. There was no absolute rule on procedural unfairness.

SIR IGOR JUDGE P and **MORE-BICK LJ** agreed.

Camden Primary Care Trust v Atchoe; 9 May 2007
CA: Sir Igor Judge P, Moore-Bick LJ and Sir Peter Gibson; [2007] EWCA Civ 714

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